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No. 05-1478

In The
Supreme Court of the United States

HENRY E. GOSSAGE,
Petitioner,

v.

STATE OF WASHINGTON, ET AL,
Respondents

On Petition for Writ of Certiorari to the
U.S. Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORAI

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QUESTION PRESENTED

1. Did the State and its Agencies deny Petitioner's his Veteran Preference over a Non-Veteran?

2. Does the Veteran Preference statute created by Wash. Rev. Code § 73.16.010, afford the referred Qualified Civil Service Veteran candidate a preference over the referred Qualified Civil Service non-veteran candidate in Civil Service appointment and employment?

3. Did Petitioner raise any employment discrimination claims within the statute of limitation?

4. Is the limitations tolled in any employment discrimination claim where the employer proffered a systemic policy or practice of employment discrimination?

PARTIES TO THE PROCEEDINGS

Plaintiff, Petitioner

Henry E. Gossage

Defendants-Respondents

The State of Washington
Wanamaker, Blackwood, Spencer, McFadden, Anderson, Peters, Brehmeyer, Giorgio, McMurdie, Drapeau, D.Smith, Sanford, M. Smith, D.G. Smith, McHarg, Lofgren, Allen, Lundeen, Weiss, Kaulfold, Monahan, Reese, West, Baron, Grady, Donnelly, Rogers, Carter, Horton, et al.

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PETITION FOR WRIT OF CERTIORAI

Petitioner, Pro Se Veteran, Henry E. Gossage respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINION BELOW

The second unpublished opinion of the court of appeals is unreported. (App. A) The first opinion is 91 Fed. Appx. 593. (App. A2) Petitioner filed a motion to recall mandate and rehearing, because Petitioner submitted the wrong cause number on the filing for rehearing. Pro Se Petitioner is timely filing this petition to avoid dismissal on a technicality. Both orders of the district court in unreported. (App. B1, B2) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 13, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in relevant part:
No person shall be.. Nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:
No state shall..... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC § 1658 provides in relevant part: Time limitations on the commencement of civil actions arising under Acts of Congress, Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

42 U.S.C. § 1981 provides in relevant part: Equal rights under the law

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1982 provides in relevant part: All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983 provides in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

38 U.S.C. § 4311(a) (USERRA) provides in relevant part: A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of

employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4323(i) provides in relevant part: Inapplicability of State Statute of Limitations.--No State statute of limitations shall apply to any proceeding under this chapter.

RCW 73.04.090 provides in relevant part: All benefits, advantages or emoluments, not available upon equal terms to all citizens, including but not being limited to preferred rights to public employment .... which by any law of this state have been made specially available to war veterans

RCW 73.16.010 provides in pertinent part: "SHALL BE preferred for appointment and employment"

RCW 73.16.020 provides in relevant part: All officials or other persons having power to appoint to or employment in the public service set forth in RCW 73.16.010, are charged with a faithful compliance with its terms, both in letter and in spirit, and a failure therein shall be a class 1 civil infraction.

WAC 356-22-180 Examination--Oral examining panel. (1) The members of oral examining panels shall be chosen primarily for their ability to judge the qualifications of applicants objectively. At least one member by past experience and training shall be generally familiar with the nature of the work for which the examination is being given. Emphasis will be placed on including at least one affected group member on each oral examining panel. (3) If conditions require establishing multiple panels, tests and instructions shall be structured to ensure uniformity of examining conditions and rating standards. (4) Members of oral examining panels shall disclose each instance in which they know an applicant to the extent that they have formed a prior personal bias for or against an applicant and shall disqualify themselves without rating the applicant or biasing the remaining members.

STATEMENT OF THE CASE

This is a civil service employment discrimination case. Petitioner brought action against each individual in their individual and official capacity on employment discrimination, veteran employment vested rights, and violating Plaintiff's civil rights under the color of State and Federal law. Plaintiff asserted numerous federal and state laws supporting the issues and claims. The systemic discriminatory policy and pattern of conduct by the State of Washington and its agency supervisor's denied Petitioner

employment in over 40 actual civil service referrals and agency interviews between 1995-2001. Despite being the most qualified disabled veteran applicant and being referred to the agency in several underutilized affirmative action categories (Vietnam-era veteran, disabled veteran, Japanese heritage, and a person with a physical disability), the agency hired a non-veteran and a non-underutilized affirmative action candidate. Petitioner was denied employment as a Vietnam-era veteran, disabled veteran, age, Japanese heritage, age, and a person with a physical disability.

A. Statement of the Facts

1. The factual and procedural background for this matter is relatively straightforward. Petitioner sought employment beginning in 1995. Petitioner pursued his veteran's preference under RCW 73.16.010.

Beginning in 1995 through 2001, Petitioner sought re-employment/employment with the State of Washington. Specifically, Petitioner had 31/2 years of prior agency specific experience with Department of Labor and Industries, Safety and Health, as an Compliance Industrial Hygienist and lead ICP/AA Chemist. Petitioner superior qualifications are undisputed in the record. In addition to agency specific work experience, Petitioner had an excellent compliance record as an Industrial Hygienist, and excellent reviews from Petitioner's prior supervisor. (App. C-1, C3-2, C4-1, C4-2)

Petitioner had two annual major compliance inspection reviews by Lofgren (Petitioner prior supervisor). Petitioner's annual reviews were on-site independent safety and health complaint inspections. These two unannounced compliance inspections were large industrial plant operations; 1.) New West Gypsum, a large Gypsum Recycling operation plant and; 2.) Simpson Tacoma Kraft, the second largest paper and pulp mill in

the State of Washington. Plaintiff had excellent Industrial Hygienist evaluation from Lofgren , (App. C-1, C3-2, C4-1,C4-2).

> "Henry is presently working on a comprehensive inspection of a pulp mill".

This paper and pulp mill is was the second largest pulp mill in the State of Washington.

> "His work habits in the office over the past year have been the best of the group..."

> "He has actively participated on an important committee evaluating the Division's laboratory", Performance Evaluation July 29, 1991.

Lofgren's references check statements are contradictory to Petitioners annual reviews. Petitioner "was never a member of a successful work team".

Two Assistant Directors for the agency deemed Petitioner well qualified,

> "Due to Henry's previous salary and his familiarity with Industrial Hygiene activities, gained from working in the laboratory..." (App. C1)

2. This is a civil service employment case, which contains an intricate set of administrative policies and procedures administered by Department of Personnel for the State of Washington (DOP). Department of Personnel (DOP) received Petitioner's employment applications for the various agency employment vacancies and determined Petitioner's qualification for those positions. DOP scored Petitioner's application and placed Petitioner on a certified register of eligible candidates.

Petitioner passed this intricate Independent State Civil Service examination. DOP certified Petitioner as a qualified candidate for each of the positions the agency was seeking to hire. DOP creates and maintains one register for each specific employment position. (App. D1, E)

Petitioner's State application was independently examined and rated by DOP and placed on a certified list of qualified eligible candidates. Plaintiff was deemed "Qualified" by the DOP. When the agency sought to fill a vacant position, the hiring agency requested a certified list of eligible candidates from DOP (7-10 candidates). Petitioner was referred by DOP to the selecting agency on over 40 separate referrals and actual agency interviews for appointment and employment. At the agency request, Petitioner was referred based on Petitioner's open competitive score, re-employment, and countless number of agency underutilized affirmative action categories. (Vietnam-Era Veteran, Disabled Veteran, Asian-Pacific Islander, or a person with a physical disability) Michael McCauley, The agency's affirmative action coordinator was apprised Petitioner is a Veteran within the meaning of RCW 73.16.010 and met four of the agencies current underutilized affirmative action categories (Vietnam-era veteran, disabled veteran, age, Japanese heritage, and a person with a physical disability).

Petitioner was given negative references by three agency supervisors:

1. Lofgren stated, he would you rehire me, based on his record with me, because he used the merit system rules (Civil Service regulations) to his advantage. (App. G2)
2. Bob Parker stated, he would have to think about hire Petitioner. (App. G4)
3. John Walkenhauer stated in a conversation with Reese, another agency supervisor, "there is no way that the department would never hire him back." (App. G1)

In Three interviews, after the interview process was complete, the agency did not make a selection, but cancelled the referral to expand its hiring pool. (App. H)

In one interview, Petitioner was the only interviewing candidate who was given a different set interview questions, than the other interviewing candidates. A Non-affirmative action candidate was selected for that position. (App. I2)

DOP referred Petitioner on the re-employment register and wasn't selected. (App. D1-2) Petitioner was denied employment in every vacant employment opportunity with the agency. A non-veteran referred candidate and/or non-affirmative action underutilized candidate was selected.

B. Procedural History

Petitioner initiated this Pro Se complaint on March 13, 2003. (USDC Dkt. 1,7) Petitioner asserted employment discriminatory conduct by Respondents under federal law in violation of 42 U.S.C. § 1981, 42 U.S.C. § 1982, 42 U.S.C. § 1983, 42 U.S.C. § 1985, 42 U.S.C. § 1986, 42 U.S.C. § 1988, 42 U.S.C. § 2000e et seq. (Title VII), and Veterans employment rights under USERRA, 38 U.S.C. § 4311(a). Petitioner also asserted violations of State law of veteran employment discrimination pursuant to RCW 73.16.010 et seq. and RCW 49. J. Bryan denied Petitioner discovery, at the States request. (USDC Dkt. 24, 38, 56). The State and Court has placed high emphasis with Petitioner as a "former convict status" label. Petitioner did not claim, "former convict status" as any basis for discrimination (Emphasis added) and this "label" was not mentioned in any briefing or argument before the USDC or the NINTH Circuit.

1. USDC First Motion for Summary Judgment, June 28, 2003 (App. B1)

The State moved for dismissal on Rooker-Feldman doctrine, collateral estoppel, 11th amendment, and exhaustion of remedies, statute of limitations. Petitioner cross-motioned for summary judgment on the basis; respondents discriminated against him under state and federal law.

The Court of Appeals vacated and remanded the USDC Order in its entirety on March 23, 2004. Respondents filed a Motion for reconsideration and their motion was denied. (App. A2)

2. USDC Second Motion for Summary Judgment, October 4, 2004 (App. B2)

After remand, Petitioner was again denied discovery. J. Bryan rendered his second Order on the same arguments the State rose the first time. The fist and second order are identical, with the exception of any reference to the Rooker-Feldman doctrine.

The Court of Appeals affirmed on statute of limitations and a tie-breaking preference based on a non-civil service Washington Court of Appeal case. (App. A1)

REASON FOR GRANTING THE WRIT

1. The Judgment below Conflicts with Decisions of This Court and of Other Circuits

   A. The conflict of Federal Statute of Limitations.

   B. The Conflict in construing a State Statute, the Federal Court is bound by the pronouncements of the state's highest Court.

   C. The Conflict in the fundamental rules of Statutory construction in RCW 73.16.010.

A. The conflict of Federal Statute of Limitations

1. 42 U.S.C. § 1981

Petitioner's discrimination claims pursuant to 42 U.S.C. § 1981 fall under the 4-year statute of limitations. Congress enacted a catchall 4-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990, 28 USC § 1658 underlying 42 USC § 1981. *Jones v. Donnelley*, 124 S. Ct. 1836 (2004); *Thinket Ink Information v. Sun Microsystems*, 368 F.3d 1053 (CA9 2004); *Dandy v. UPS*, 388 F.3d

263 (CA7 2004). At a minimum, any interviews from March 1999 through 2001 should have been considered (West, Kaulfold, Monahan, Horton, Baron, Lofgren, Allen, Cohen, LcFadden, Lunden, Brehmeyer, Weiss). (App. F)

2. 42 U.S.C. § 1983

Petitioner's claims under 42 U.S.C. § 1983 fall under the 3–year limitation and maybe a 4-year limitation period. Under the 3-year, West, Kaulfold, Monahan, Horton, and Baron should have liability. (App. F14-17)

3. 38 U.S.C. § 4311(a), USERRA

The veteran employment right pursuant to 38 U.S.C. § 4323(i) clearly states, "No State statute of limitations shall apply to any proceeding under this chapter" (emphasis added). *Rogers v. San Antonio*, 392 F.3d 758 (CA5, 2004). "The Department [of Labor] has long taken the position that no Federal statute of limitations applied to actions under USERRA." 69 F.R. No. 181 at 56281

All of Petitioner's USERRA discrimination claims against the respondents should have been considered.

B. The Conflict in construing a State Statute, the Federal Court is bound by the pronouncements of the state's highest Court

The Courts of Appeals refused to follow several Washington State Supreme Court presidential decisions directly in point with RCW 73.16. The language of the statute does not support the expansive interpretation urged by the State. The District court, Respondents, and Petitioner agreed, the federal courts are bound by the pronouncements of the Supreme Court of Washington, the states highest court." *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538, 543 (1941); *Erie R. Co. v. Tompkins*; 304 U.S. 64, 76-79 (1938); *Davis v. Metro*, 885 F2.d 515, 514 (CA9, 1989); *Travelers Insurance v.*

Carpenter, 411 F.3d 323 (CA2, 2005); *Willow Inn v. Public Service*, 399 F.3d 224 (CA3, 2005); *AllState v. Thrifty*, 249 F.3d 450, 454 (CA6, 2001); *Youren v. Tintic School*, 343 F.3d 1296 (CA10, 2003). *See Missouri v. Hunter*, 459 U.S. 359, 368, 103 S. Ct. 673 (1983) (stating that although federal courts are bound to the construction of a state statute by the state's highest court, federal courts are not bound to their conclusions).

The Court of Appeals followed the recommendation of the District Court. The decision of the Washington Court of Appeals in *Gossage v. State*, 112 Wn. App. 412 (2002) was based on the erroneous decision from *Mitchell v. Bd. of Indus. Ins. Appeals*, 109 Wn. App. 88 (2001).

The major difference in the two cases, Mitchell is a non-civil service veteran case pursuant to RCW 41.06.020 (6) "Noncompetitive service" means all positions in the classified service for which a competitive examination is not required.

> RCW 41.06.020 (6) "Noncompetitive service" means all positions in the classified service for which a competitive examination is not required.

Department of Personnel (DOP) was not involved in determining Mitchell qualifications for that position. Mitchell did not undergo an intricate Independent State Civil Service examination.

Gossage is a state civil service veteran case. Petitioner passed an intricate Independent State Civil Service examination administered by DOP, was certified and referred to the agency for appointment. (App. D, E)

> RCW 41.06.020(4) "Competitive service" means all positions in the classified service for which a competitive examination is required as a condition precedent to appointment.

The controlling civil service veteran employment case law should be the Washington Supreme Court veteran cases in State *ex. Rel. Raines v. City of Seattle*, 134 Wash. 360, 235 P. 968 (1925); *State Ex. Rel Buchanan* v. Seattle, 171 Wash. 113, 119; 18 P.2d 3 (1933); *Bond v. State,* 70 Wn.2d 746, 425 P.2d 10 (1967); *Breslin v. Todd*, 8 Wn.2d 483, 18 P.2d 3 (1941). The Washington Supreme Court is the states highest court, not the Court of Appeals.

C. The Conflict in the fundamental rules of Statutory construction in RCW 73.16.010

The Court of Appeals used the phrase "tie breaker" or "equally qualified" in its interpretation of RCW 73.16.010. These two phrases or words the court added do not exist in the statute and one cannot reconcile this interpretation with legislative intent of the statute. The phrase, "shall be preferred" is a mandatory directive and affords no discretion to its interpretation. This is a direct requirement governing the action of the court. *Scannell v. City of Seattle*, 97 Wn.2d701, 704-705 (1982); *ex rel. PublicDisclosure Comm., v. Rains*, 87 Wn.2d 626, 633-34 (1976); See *Carpenter v. Walbash* RR, 309 U.S. 23; 60 S. Ct. 416 (1940)

> RCW 73.16.010 In every public department, and upon all public works of the state, and of any county thereof, honorably discharged soldiers, sailors, and marines who are veterans of any war of the United States, or of any military campaign for which a campaign ribbon shall have been awarded, and their widows or widowers, shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the capacity necessary to discharge the duties of the position involved

The addition of these two phrases changes the entire context of the Veteran preference statute and its original legislative intent. The "cardinal canon" of statutory

interpretation is "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. U.S.*, 449 U.S. 424, 430; 101 S. Ct. 698 (1981); *U.S. v. Goldenberg*, 168 U.S. 95, 102-103, 18 S. Ct. 3 (1897); *Oneale v. Thornton*, 10 U.S. 53, 6 Cranch 53, 68, 3 L. Ed. 150 (1810).

ARGUMENT

1. Qualifications

Petitioner qualifications were superior to the selected candidate. Petitioner had agency-specific experience and the selected candidates did not have agency-specific experience. (App. C) The 10th Circuit in Bauer ruled, although the selected candidate had less education and experience than the complaining party, the selected candidate had experience with the agency and was familiar with the actual task required of the position sought, rendering the selected candidate more qualified. (Emphasis added) *Bauer v. Bailar*, 647 F2.d 1037, 1048 (CA10, 1981).

> "Each of the selected candidates had significantly more experience at the SSA than Jones and such experience seems to us a reasonable criterion on which to base a decision to promote." *Jones v. Barnhart*, 349 F3.d 1260, 1268 (CA10, 2003).

This Court's recently addressed the issue of qualifications in *Ash v. Tyson Foods, Inc., 2006 U.S. LEXIS 1816 (2006),* qualifications evidence may suffice, at least in some circumstances, to show pretext. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-188, 109 S. Ct. 2363(1989) (indicating a plaintiff "might seek to demonstrate that

respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position"), superseded on other grounds by 42 U.S.C. § 1981(b); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259, 101 S. Ct. 1089 (1981); *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185, 1194 (CA9, 2003) (holding that qualifications evidence standing alone may establish pretext where the plaintiff's qualifications are "clearly superior" to those of the selected job applicant); Aka v. Washington Hospital Center, 332 U.S. App. D.C. 256, 156 F.3d 1284, 1294 (CADC, 1998) (en banc) (concluding the fact finder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job"). *Jauregui v. Glendale*, 852 F.2d 1128, 1135-36 (CA9, 1988) the use of subjective factors (i.e., the interview process) to evaluate applicants is not illegal per se, but may be used as a covert means to effect intentional discrimination.

The State continued denial of any employment opportunity was intentional discrimination and the state justification was pretext. The agency justification was, Petitioner was not the best candidate, a better candidate was selected, no selection was made, or the agency desired to expand the hiring pool and continues to recruit. *Gressman vs DA, NGB*, EEOC #01993872 (2002) (App. H)

2. RCW 73.16.010, Veteran Preference

The Washington Supreme Court has ruled in several Veteran Civil service employment cases, where the applicant passed an intricate civil service examination, rated, and place on a list of certified eligible candidates, and referred to the hiring authority. *State ex. Rel. Raines v. City of Seattle,* 134 Wash. 360, 235 P. 968 (1925); *State*

Ex. Rel Buchanan v. Seattle, 171 Wash. 113, 119; 18 P.2d 3 (1933); *Breslin v. Todd*, 8 Wn.2d 483, 18 P.2d 3 (1941); *Bond v. State*. 70 Wn.2d 746, 425 P.2d 10 (1967). One Washington Court Appeal has ruled in one civil serve veteran case, *Bjorseth v. Seattle*, 15 Wn. App 797, 551 P.2d 1372 (1976). Mitchell is a non-civil service case and did not undergo a civil service examination, *Mitchell v. Bd. of Indus. Ins. Appeals*, 109 Wn. App. 88 (2001)

In State *ex. Rel. Raines v. City of Seattle,* 134 Wash. 360, 235 P. 968 (1925), the Washington Supreme Court affords the following guidance to interpretation of the Washington's veteran's statute.

> "Under the general principles of law, should not be taken to mean absolute equality or exact mathematical parity upon the examination, but should be understood to mean that any and all who have passed the required test and obtained the minimum percentages necessary should be certified as eligibles, then all such persons are equally qualified no matter what there comparative standing is as shown by the percentages, and that the preference in favor of ex-servicemen should apply, regardless of exact equality of percentages." Raines at 375
>
> The Raines Court further held, "exact mathematical equality, or superiority, in percentages <u>is not</u> required nor can it be positively attained by any system of human tests."
>
> "the supreme court has no authority to read language which is not placed there by the legislature", citing Rudin vs. King-Richardson Co.,311 ILL. 512, 143 N.E. 198.

A WWI veteran was wrongfully denied his veterans preference and was entitled to locomotive engineer position when Seattle hired a non-veteran. The court concluded Buchanan had been wrongfully deprived of the position. The State Supreme Court in *State Ex. Rel Buchanan v. Seattle*, 171 Wash. 113, 119; 18 P.2d 3 (1933) was clear, when the court stated,

> "This preference did not grant the veteran an advantage, but mandates appointment over the non-veteran."

The *Buchanan* decision is in accord with the more stringent Federal Civil Service rule of three in hiring. The federal agency may not bypass a veteran to select a non-veteran on the certificate.

The Washington Supreme Court again acknowledges this veteran's preference Rem Rev statute § 10753 (RCW 73.16.010), which accorded the veteran a mandatory preference in appointment and employment. *Breslin v. Todd*, 8 Wn.2d 483, 18 P.2d 3 (1941).

In *Bond v. State*, 70 Wn.2d 746, 425 P.2d 10 (1967), the Washington Supreme Court assumed the correctness of a judgment against the State that Bond reinstated to his (civil service) job, where the issue had been tried. The Washington Supreme Court stated in 62 Wn.2d 487, 383 P.2d 288 (1963) that,

> At the time of his dismissal, realtor was an honorably discharged war veteran entitled to the benefits of RCW 73.16.010 and RCW 73.16.015...The tactics of the acting director were in direct violation of RCW 73.16.010. (Emphasis added)

The State Supreme Court determined that Bond rights under RCW 73.16.010 existed and he was entitled to seek relief under the Veteran Preference Statute.

The veteran statute was interpreted as the "first to hire and last to fire". In *Bjorseth v. Seattle*, 15 Wn. App 797, 551 P.2d 1372 (1976), the Washington Appellate Court recognized prior Washington Supreme Court decisions construed the meaning of the phrase "preference in employment" to be applicable both at the inception of employment and in the continuation of employment, citing State *Ex. Rel Ford*, 47 Wn.2d 911, 290 P.2d 465 (1955). The State Supreme Court in Ford, citing *State ex. Rel. Raines*

v. City of Seattle, 134 Wash. 360, 235 P. 968 (1925)- ruled in favor of the veteran, where no civil service law was in effect.

The federal court is bound by the pronouncements of the State Supreme Court and not by the State Appellate Court. *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538, 543 (1941); *Erie R. Co. v. Tompkins*; 304 U.S. 64, 76-79 (1938); *Davis v. Metro*, 885 F2.d 515, 514 (CA9, 1989); *Travelers Insurance v. Carpenter*, 411 F.3d 323 (CA2, 2005); *Willow Inn v. Public Service*, 399 F.3d 224 (CA3, 2005); *AllState v. Thrifty*, 249 F.3d 450, 454 (CA6, 2001); *Youren v. Tintic School*, 343 F.3d 1296 (CA10, 2003). *See Missouri v. Hunter*, 459 U.S. 359, 368, 103 S.Ct. 673 (1983) (stating that although federal courts are bound to the construction of a state statute by the state's highest court, federal courts are not bound to their conclusions). The State Supreme Court in Raines construed the strict reading of RCW 73.16.010, 015, 020 and its enforcement statutes do confer a mandatory preference, once the veteran passes the requisite civil service exam and is referred to the appointing and employing agency for employment.

a.) Petitioner has a Constitutional protected property interest in receiving a "Preference" in appointment and employment pursuant to RCW 73.16.010.

The decision to deny this "Preference", a preference which is mandated by statute, is an adverse action against the veteran and thus raises a due process violation under the 14th amendment and "taking" and right to "liberty" under the 5th amendment. The intent of the State to deny this "Preference" is a deprivation not only of present government employment but also of all future opportunities. This underlying motive of the State is certainly a question for a jury. The refusal to give the entitled Preference is no small injury. This "substantial adverse effect" under these circumstances would constitute a

state-imposed restriction on liberty. Just like the right to travel, *New York v. Soto-Lopez*, 476 U.S. 898; 106 S. Ct. 2317 (1986). The right to liberty is implicated when the State denies a statutory preference. "Substantive due process . . . guarantees that the state will not deprive a person of those rights for an arbitrary reason regardless of how fair the procedures are that are used in making the decision." *Archuleta v. Colorado*, 936 F.2d 483, 490 (CA10, 1991). Rights protected by due process are "'created and there dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Jones v. University*, 13 F.3d 361, 365 (CA10, 1993) (quoting *Perry v. Sindermann*, 408 U.S. 593, 602 n.7, 92 S. Ct. 2694 (1972)).

The Supreme Court has interpreted similar language in federal law as a mandatory absolute command. *Hilton v. Sullivan*, 334 U.S. 323 (1948). Other courts have interpreted, once qualified, the veteran "shall be preferred for appointment", is an absolute veteran hiring preference. *Keim v. United States*, 177 U.S. 290 (1900); *Mass. v. Feeney*, 442 U.S. 256 (1978)

While this benefit may not rise to the same level of importance as the necessities of life and the right to vote, it is unquestionably substantially sufficient to state an unlawful deprivation of a preferential right. The 3rd Circuit explained the operation of the Veteran Preference in *Gikas v. Washington*, 328 F.3d 731 (CA3, 2003), "Gikas has a property interest only after he has demonstrated that he has met the requisite qualifications. The veteran's preference comes into play only if he has the "requisite qualifications" for the job. *Carter v. Philadelphia*, 989 F.2d 117, 122 (CA3, 1993). Petitioner's met this substantive due process criterion. Petitioner's procedural due process rights were violated when; Petitioner passed the independent civil service exam,

determined independently qualified (DOP), referred to the selecting agency as one of the certified underutilized affirmative action hiring candidates, and was denied the "preference". The granting of a statutory preference is constitutionally protected and is afforded Constitutional protection.

> "In addition, the veteran's right to be granted the statutory preference is constitutional protected. If it is denied, a cause of action under 42 U.S.C. § 1983 may arise", Carter at 118

The District Court stated Petitioners veteran preference is minimal. The denial of this minimal veteran preference still constitutes a due process violation. What is the value in a "preference" that does not result in receiving the benefit of the preference?

3. Discrimination

Plaintiff may establish a prima facie case of discrimination under the McDonnell Douglas framework by showing by identifying the pertinent prima facie case under the traditional burden-shifting analysis from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Petitioner needs to show that (1) he was a member of a protected class; (2) he applied for and was qualified for the position; (3) despite being qualified, he was rejected; and (4) after he was rejected, the position was filled.

a.) 42 U. S. C. § 1981

Both 42 U.S.C. § 1981 and Title VII covers all levels of discriminatory conduct by respondents, the detailed procedures of Title VII are rendered a dead letter. Petitioner is free to pursue claims of discrimination under 42 U.S.C. § 1981 without resort to those statutory prerequisites. *Patterson V. McLean*, 491 U.S. 164; 109 S. Ct. 2363 (1989). *Swierkiewicz v. Sorema*, 534 U.S. 506, 509; 122 S. Ct. 992 (2002).

1. Petitioner is a member of the following protected class and was referred by DOP to the appointing agency in many underutilized affirmative action categories; Asian-Pacific Islander, Vietnam-Era Veteran, Disabled Veteran, and People with Disabilities
2. Petitioner applied and interviewed in over 40 positions and was qualified by DOP for every position and Petitioner had 3 ½ years of agency-specific experience.
3. Despite Petitioner's agency specific experience and having superior qualifications, Petitioner was rejected in every agency hiring decision.
4. A non-affirmative underutilized referred candidate filled the position or the hiring agency decided not to fill the position by canceling the appointment referral and expand the hiring pool.

"Negative references" by Lofgren, Reese, and Parker, which were disseminated throughout the agency impaired Petitioners rights under 42 U. S. C. § 1981. *Patterson v. MCU*, 491 U.S. 164;109 S. Ct. 2363 (1989); *Hashimoto v. Dalton*, 118 F.3d 671, 674 (CA9, 1997); *Vasques v. County of L.A.*, 307 F.3d 884, 892 (CA9, 2002); *E.E.O.C. v. Foster*, 123 F.3d 746, 754, 755 (CA3, 1997) Petitioner has provided both direct and circumstantial evidence of the existence of a genuine issue of material fact that Respondent's did discriminated against Plaintiff, because of race, age, physical disability, and created a hostile work environment.

Panel members involved in the interview and selection process must be above reproach in their actions. The slightest inference of bias in any form can be a form of discriminatory treatment.

> WAC 356-22-180 "Members of oral examining panels shall disclose each instance in which they know an applicant to the extent that they have formed a prior personal bias for or against an applicant and shall disqualify themselves without rating the applicant or biasing the remaining members"

All three of these individuals are regional supervisors within the agency. Reese, Lofgren's, and Parker's negative reference is direct evidence of bias (Dkt 18-I). Lofgren, as a program manager within the agency, created a hostile environment towards Gossage

by disseminating this negative information unsupported by the record throughout the agency. The failure of any one member (Reese and Lofgren) on the interview panel to disqualify themselves pursuant to WAC 356-22-180, and follow its own administrative policy and procedures invalidates the entire hiring process. *U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499 (1954).

Plaintiff interviewed two times with Giorgio. Giorgio reviewed Plaintiff's personnel file after interviewing Plaintiff. (App. G5) Plaintiff's personnel file contained unlawful stigmatizing information since 1992. Lofgren placement of derogatory negative information in Plaintiff's personnel file without knowledge or consent and unrelated to Plaintiff employment (App. G5), implicates the liberty interest. See *Boxer v. Cox*, 359 F.3d 1105 (CA9, 2004); *Board of Regents v. Roth*, 408 U.S. 564, 573; 92 S.Ct. 2701 (1972).

The Industrial Hygiene Manager for the agency's laboratory, stated "I have Mr. Gossage the highest score on the panel. (Emphasis added) Peters initially selected a non-affirmative action candidate. Peters was informed to select a +3 affirmative action candidate. (App. I1) The selected candidate was not the "BEST" or a +3 certified referred affirmative action candidate by DOP. (App. D1-2)

In a correspondence from Michele Hooper to Wanamaker, dated October 23, 1998, she placed this affirmative action issue of HIGH importance, "We have not met out goals" of which Plaintiff satisfied 4 of 8 underutilized categories. (App. D3) Wanamaker's declaration (Dkt 18-H), he stated Puente, a +3 candidate was selected. According to Dillon's declaration, shows both Gossage and Puente (agency promotional

candidate), position was filled (FI) and Barnett was appointed. Barnett was not referred as an underutilized affirmative action candidate. Its clear from the record, Wanamaker did not fill the position with Puente or an affirmative action candidate as he stated in his declaration.

Tracy Spencer stated, "not the best candidate" and a non-affirmative action candidate was selected. The agency referral stated, "we have not met out goals in the groups marked below", which Plaintiff met two of the three goals. (App. D3)

L&I Personnel Daigre told McFadden, to use the same interview questions for Meese and Gossage, since McFadden had preselected a non-affirmative action candidate. McFadden's declaration, Plaintiff was given a fair chance to (App. I2), however McFadden used two different sets of interview questions for Meese and Gossage. Meese had excellent references; Gossage reference, "previous supervisor within L&I did not provide a favorable recommendation and "would not hire him". (App. I2-4) Plaintiff interviewed with McFadden on three separate occasions and after the third interview process, McFadden chose not to hire Plaintiff and cancelled the hiring register, to expand the hiring pool. (App. H3)

b.) USERRA, 38 U.S.C. § 4311(a)

It is undisputed Petitioner was referred by DOP to the agency in two underutilized affirmative action categories, Vietnam-era Veteran and Disabled Veteran. (Emphasis added, App. D3) Moreover, "because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries." *Hill v. Michelin*, 252 F.3d 307, 312-13 (CA4 2001), (citing, e.g., *Coffy v. Republic Steel*, 447 U.S. 191, 196, 100 S. Ct. 2100, (1980) (predecessor

statute VRRA was "to be liberally construed for the benefit of the returning veteran"); *McGuire v. UPS*, 152 F.3d 673, 676 (CA7, 1998) ("USERRA is to be liberally construed in favor of those who served their country.").

The Federal Circuit found in *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001), "the USERRA prohibits discrimination in employment on the basis of military service." Under this provision, Petitioner's was denied initial employment based on his status, as a disabled veteran is cognizable. *Slentz v. U.S. Postal Service*, 92 M.S.P.R. 144, ¶ 8 (2002); *Bagunas v. U.S. Postal Service*, 92 M.S.P.R. 5, ¶¶ 17, 18 (2002); *cf. McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 415 (1998); *Henderson v. U.S. Postal Service*, 95 M.S.P.R. 454, ¶ 6 (2004); Jasper *v. U.S. Postal Service*, 73 M.S.P.R. 367, 369 (1997)

Petitioners USERRA rights are enforceable under 42 USC § 1983, it simply provides a mechanism for enforcing a right or benefit established elsewhere. *Morris-Hayes v. Bd. of Educ.*, 423 F.3d 153 (CA2, 2005); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S. Ct. 2427 (1985); *Maine v. Thiboutot*, 448 U.S. 1, 4, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980). Congress, acting pursuant to its War Powers, see U.S. Const. art. I, § 8, "removed the Eleventh Amendment bar to damages actions brought under USERRA. The Eleventh Amendment immunity defense to the claim for damages fails as well. *Reopell v. Massachusetts*, 936 F.2d 12, 16 (CA1, 1991).

Petitioner had agency-specific experience, superior qualifications, referred to the agency as an underutilized affirmative action candidate (Vietnam-era Veteran and Disabled Veteran), interviewed in over 40 employment positions, negative references from agency supervisors, and the agency violate its own hiring polices and practice in its

hiring and selection process. The standard of proof in a discrimination claim under the USERRA is the so-called "but for" test or "true doubt" rule. Petitioner established his discrimination case and that the burden of proof is on the agency. *OWCP v. Greenwich*, 512 U.S. 267, 114 S. Ct. 2251 (1994). The agency produced no evidence, where the adverse action not to hire Petitioner was for a valid reason. Even if the agency's evidence is evenly balanced, Petitioners prevails. The State and its agencies did discriminate and violate Petitioner's USERRA rights.

CONCLUSION

The Fourteenth Amendment mandates that No State "deny to any person within its jurisdiction the equal protection of the laws." Pro Se Veteran seeks his day in court. For the foregoing reasons, the judgment of the court of appeals should be reversed with instruction.

DATED: March 2, 2006

Respectfully Submitted,

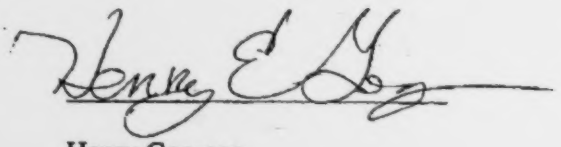
_____

Henry Gossage
Pro Se Veteran
9421 Johnson Pt. Lp NE
Olympia, WA 98516
(360) 438-1069

I Henry Gossage did place in U.S. Mail on March 2, 2006:

Petition for Writ of Certiorari

Attorney General of the State of Washington
Michael Lynch, Assistant AG
Torts Division
P.O. Box 40126
Olympia, WA 98504-0126



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APPENDIX

No._____

In The Supreme Court of the United States

HENRY E. GOSSAGE,
Petitioner,

v.

STATE OF WASHINGTON, ET AL,
Respondents

On Writ of Certiorari to the
U.S. Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORAI

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APPENDIX A

A1	USCA Memorandum	December 13, 2005
A2	USCA Memorandum	March 23, 2004

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 13 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

HENRY E. GOSSAGE,

Plaintiff - Appellant,

v.

STATE OF WASHINGTON; et al.,

Defendants - Appellees.

No. 04-35970

D.C. No. CV-03-05138-RJB

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Submitted December 5, 2005**

Before: GOODWIN, TASHIMA, and FISHER, Circuit Judges.

Henry E. Gossage appeals pro se the district court's summary judgment in favor of the defendants in his 42 U.S.C. § 1983 action alleging discrimination in hiring on account of his race, former convict status, and disability. Gossage also

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

A1

alleged that defendants violated his right to due process by not according him the veteran's preference provided by Wash. Rev. Code § 73.16.010. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc), and we affirm.

The district court properly granted summary judgment on Gossage's claims arising from events that occurred before March 13, 2000, because they were time-barred. *See* Wash. Rev. Code § 4.16.080(2) (providing a three-year statute of limitations for personal injury actions).

The district court properly found that the tie-breaking preference created by Wash. Rev. Code § 73.16.010 did not create a federally-protected property interest in employment that defendants violated. *See Mitchell v. Bd. Of Indus. Ins. Appeals*, 34 P.3d 267, 269-70 (Wash.Ct.App., 2001); *Gossage v. Washington*, 49 P.3d 927, 934 (Wash.Ct.App., 2002).

The district court properly granted summary judgment on Gossage's race discrimination claims under Title VII because he failed to raise these claims first with the EEOC. *See* 42 U.S.C. § 2000e-16(c); *Sommatino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001).

Gossage's remaining contentions lack merit.

AFFIRMED.

A1

BEST AVAILABLE COPY

HENRY E. GOSSAGE, Plaintiff - Appellant, v. STATE OF WASHINGTON; et al., Defendants - Appellees.

No. 03-35588

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

91 Fed. Appx. 593;2004 U.S. App. LEXIS 5562

March 15, 2004 **, Submitted** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

March 23, 2004, Filed

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Subsequent appeal at **Gossage v. Washington, 2005 U.S. App. LEXIS 27717 (9th Cir. Wash., Dec. 13, 2005)**

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-03-05138-RJB. Robert J. Bryan, District Judge, Presiding.

COUNSEL: HENRY E. GOSSAGE, Plaintiff - Appellant, Pro se, Olympia, WA.

For WASHINGTON STATE OF, WANAMAKER, BLACKWOOD, SPENCER, MCFADDEN, ANDERSON, PETERRS, BREHMEYER, GIORGIO, MCMURDIE, DRAPEAU, DENNIS SMITH, UNKNOWN SANFORD, M. SMITH, D. G. SMITH, MCHARG, LFOGREN, ALLEN, LUNDEEN, WEISS, KAULFOLD, MONAHAN, REESE, LOFGREN, WEST, BARON, GRADY, DONNELLY, ROGERS, CARTER, Defendants - Appellees: Michael Patrick Lynch, AGWA - OFFICE OF THE WASHINGTON ATTORNEY GENERAL (OLYMPIA), Olympia, WA.

JUDGES: Before: B. FLETCHER, TASHIMA, and WARDLAW, Circuit Judges.

OPINION: MEMORANDUM *

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by **Ninth Circuit Rule 36-3**.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*2]

A2

Henry Gossage appeals pro se the district court's order granting the defendants' motion for summary judgment, denying Gossage's cross-motion for summary judgment, and dismissing the action. We have jurisdiction pursuant to **28 U.S.C. § 1291**. We review summary judgment de novo. **Collings v. Longview Fibre Co., 63 F.3d 828, 831 (9th Cir.1995)**. We vacate and remand.

The district court dismissed the majority of Gossage's federal claims pursuant to the *Rooker-Feldman* doctrine, reasoning that they were "inextricably intertwined with the state law issues decided by the Washington state courts." Following this, we issued our opinion in **Noel v. Hall, 341 F.3d 1148 (9th Cir. 2003)**, in which we clarified application of the *Rooker-Feldman* doctrine in this circuit. We held in *Noel* that "only when there is already a forbidden de facto appeal in federal court does the 'inextricably intertwined' test come into play." **Id. at 1158**. Such a de facto appeal arises only "when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of [*3] that court." **Id. at 1163**.

Here, Gossage does not assert "as a legal wrong an allegedly erroneous decision by a state court" and does not seek relief from the state court judgment dismissing his claims. Instead, Gossage alleges claims only against adverse parties to his state court action. Therefore, Rooker-Feldman does not apply here. *See* **Noel, 341 F.3d at 1163-64**.

Accordingly, we vacate the district court's order granting summary judgment and remand for further proceedings.

VACATED and **REMANDED.**

A2

APPENDIX B

B1	USDC Order	October 4, 2004
B2	USDC Order	June 28, 2003

DKT 27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HENRY GOSSAGE,

Plaintiff,

v.

STATE OF WASHINGTON, et al.,

Defendants.

Case No. C03-5138RJB

ORDER

This matter comes before the court on Defendants' Motion to Dismiss (Dkt. 8), which was converted by the court to a motion for summary judgment; plaintiff's Motion to Add Defendant's [sic] (Dkt. 19); and Plaintiff's Cross Motion for Summary Judgment (Dkt. 18). The court has considered the pleadings filed in support of and in opposition to the motion, and the remainder of the file herein.

PROCEDURAL HISTORY

Plaintiff filed a civil action in state court in Washington, contending that the State of Washington discriminated against him due to his disability, race, former convict status, and status as a veteran. Dkt. 8, Appendix A, *Gossage v. State*, No. 26796-9-II, at 2. The trial court dismissed the claims and plaintiff appealed the decision. On July 2, 2002, the Washington Court of Appeals affirmed the ruling of the trial court, holding that (1) the State did not violate state veteran's preference laws, RCW 73.16.010 and RCW 41.04.010, because the employment positions plaintiff sought and for which he was not hired were based on competitive examination, and plaintiff was not equally qualified to the applicants ultimately chosen for the positions; and (2) plaintiff had not stated a prima facie case of discrimination based upon his race (Japanese-American), his disability (psoriasis), or his former convict status. *Id.* According to the complaint, review was "terminated in State Court of Appeals 26796-9II [sic] on February 4, 2003." Dkt. 7, at ¶ 2.10.

On March 13, 2003, plaintiff filed this civil action (Dkt. 1), and an amended complaint was filed on March 27, 2003 (Dkt. 7). Plaintiff claims that he is an honorably discharged veteran, and that he has been denied employment with agencies of the State of Washington. He contends that the State of Washington and numerous individually named defendants (1) violated his civil rights under 42 U.S.C. § 1983 when they discriminated against him as a veteran and failed to honor veteran's preferences under state and federal law; (2) violated RCW 73.16.010 when they refused to grant him his veteran's preference right to public employment; (3) discriminated against him in violation of Title VII of the Civil Rights Act of 1964; and (4) violated 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, and 1988, when they discriminated against him. Dkt. 7.

Defendants filed a motion to dismiss, contending that (1) plaintiff's claims are barred by the Rooker-Feldman Doctrine because they are inextricably intertwined with state court decisions in a state court action that dismissed his causes of action on summary judgment; (2) plaintiff's claims are barred by collateral estoppel; (3) plaintiff's cause of action under the Uniform Services Employment and Re-Employment Rights Act (USERRA) is barred by the Eleventh Amendment; (4) with regard to his USERRA claim, plaintiff has failed to state a claim under 42 U.S.C. § 1983; and (5) plaintiff's Title VII claim is barred by his failure to exhaust his administrative remedies in a timely manner. Dkt. 8.

Plaintiff opposed defendants' motion to dismiss, arguing that (1) a constitutional violation was established when the Washington Court of Appeals concluded that he was entitled under state law to be preferred for appointment and employment; (2) he qualified for veteran's preference under RCW 73.16.010; (3) most of the incidents upon which his federal court allegations in this case are based occurred after the state court action in *Gossage v. State* was initiated in March 1998; and (4) he has never stated a specific discrimination claim, and as a result, defendants' defenses are not material to his claims. Dkt. 10. With his opposition, plaintiff included letters he received regarding employment interviews and rejections for positions for which he had applied.

In their reply, defendants argued that (1) those claims litigated in *Gossage v. State* are barred by the Rooker-Feldman doctrine and collateral estoppel, as set forth in the original motion to dismiss (Dkt. 8); (2) those claims arising after March 25, 1988, but prior to Mary 13, 2000, are barred by the three-year statute of limitations; and (3) the remaining claim against Kurt Kaufold related to a March 28, 2000, letter should

be dismissed because the veteran's preference under RCW 73.16.010 does not constitute a federally protected property interest, and even if plaintiff possesses a minimal property interest, he received constitutionally adequate due process. Attached to the reply was an affidavit of Christopher Crouch and attachments.

On May 9, 2003, the court converted the motion to dismiss to a motion for summary judgment.

On May 23, 2003, plaintiff filed a cross motion for summary judgment, arguing that (1) the subject matter of this case is intertwined with the state case to the extent that the State of Washington's denial of veteran's preference to plaintiff is ongoing; (2) collateral estoppel does not apply because plaintiff will establish an ongoing pattern of a hostile employment policy against him; (3) plaintiff's hostile work environment claims are not time barred because all acts that constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period; (4) the federal court may review the state's determination of a question of federal law; and (5) plaintiff was not afforded a fair chance to compete for jobs because some of the interviewers were biased against him. Dkt. 18.

In their reply to plaintiff's cross motion for summary judgment, defendants point out that all materials plaintiff has submitted in support of his motion for summary judgment pertain to seven positions that were included in the state court action, which he lost, and the claims are therefore barred by the Rooker-Feldman Doctrine and collateral estoppel; and that these claims are all barred by the applicable three year statute of limitations.

On May 23, 2003, plaintiff filed a motion to add defendants, requesting that he be permitted to add Marty Cohen and Cindy Horton as defendants. Dkt. 19.

LEGAL STANDARD

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra)*. Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). To state a civil rights claim, a plaintiff must set forth the specific factual bases upon which he claims each defendant is liable. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Vague and conclusory allegations of official participation in a civil rights violations are not sufficient to support a claim under § 1983. *Ivey v. Board of Regents*, 673 F.2d 266 (9th Cir. 1982).

DISCUSSION

In the complaint and other pleadings, plaintiff set forth various claims and arguments. It is unclear exactly what claims plaintiff intends to pursue in this case. The court has broadly construed the complaint and documents filed by plaintiff, and has addressed all of the possible claims that plaintiff appears to raise in these documents.

1. ***Civil Rights Claims for Failure to Honor Veteran's Preference under RCW 73.16.010***

A. Claims Litigated in *Gossage v. State*. Plaintiff claims that defendants violated his civil rights when they refused to honor his veteran's preference rights under RCW 73.16.010. Defendants contend that this claim is barred by the Rooker-Feldman Doctrine; and that res judicata and/or collateral estoppel bar these claims. The record shows that the claims that were litigated in *Gossage v. State* involved incidents that occurred through March 25, 1998.

The United States Supreme Court is the exclusive means for review of final adjudications of a state's highest court. *See* 28 U.S.C. § 1257; *Valenti v. Mitchell*, 962 F.2d 288, 296 (3rd Cir. 1992). The Rooker-Feldman Doctrine precludes a federal district court from entertaining and reviewing claims adjudicated in state courts or to evaluate any Constitutional claims that are inextricably intertwined with the state court's decision. *See District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *Valenti v. Mitchell*, 962 F.2d 288 (3rd Cir. 1992). In determining whether a claim is inextricably intertwined and therefore barred under the Rooker-Feldman doctrine, the crucial issue is whether the district court is, in essence, being called upon to review the state court decision. *Ritter v. Ross*, 992 F.2d 750, 753-54 (7th Cir. 1993). *See also Worldwide Church of God v. McNair*, 805 F.2d 888, 893 (9th Cir. 1986).

Plaintiff litigated the issue of his veteran's preference under RCW 73.16.010 in the case he brought in state court, *Gossage v. State*, Dkt. 8, Appendix A. The following defendants in this case were either defendants or fact witnesses in the state case: Aage Anderson, Craig Blackwood, Henry Brehmeyer, Nina Carter, Jack Donnelly, Wendy Drapeau, Grace Giorgio, Don Lofgren, Michael A. Lundeen, John McFadden, Mark McHarg, Dan McMurdie, James Monahan, Philip Peters, Janine Rees, Michael Rogers, Lorne Sanford, Dennis Smith, Tracy Spencer, John Wanamaker, Marty Weis, and James West. The Washington Court of Appeals determined that defendants did not violate state law by declining to hire

plaintiff for state employment positions. The Washington Supreme Court denied plaintiff's petition for discretionary review. On May 2, 2003, plaintiff filed a petition for writ of certiorari with the United States Supreme Court, requesting review of the state court decision. Dkt. 22, Appendix B. That petition is apparently pending.

Under the Rooker-Feldman doctrine, this court may not relitigate the findings and ruling of the Washington Court of Appeals in regard to state law. Further, plaintiff's constitutional claims under 42 U.S.C. § 1983 are inextricably intertwined with the state law issues decided by the Washington state courts, and, in fact, resolution of those constitutional claims in plaintiff's favor would be contrary to the holding in *Gossage v. State*.

Plaintiffs claims that were actually litigated in *Gossage v. State* are barred by the Rooker-Feldman doctrine. The civil rights claims against Aage Anderson, Craig Blackwood, Henry Brehmeyer, Nina Carter, Jack Donnelly, Wendy Drapeau, Grace Giorgio, Don Lofgren, Michael A. Lundeen, John McFadden, Mark McHarg, Dan McMurdie, James Monahan, Philip Peters, Janine Rees, Michael Rogers, Lorne Sanford, Dennis Smith, Tracy Spencer, John Wanamaker, Marty Weis, and James West should be dismissed.

B. Claims arising after March 25, 1988, but before March 13, 2000. In his response to the motion, plaintiff contended that some of the incidents in which he was denied employment in violation of Washington's veteran's preference law occurred after he initiated the state court action in *Gossage v. State*. He believes that he should not be precluded from pursuing civil rights claims related to these incidents. Although it is unclear, it appears that some of the incidents to which plaintiff refers in this federal case may not have been specifically included as claims in *Gossage v. State*. Defendants maintain that the claims for incidents that occurred after March 25, 1988, but before March 13, 2000 (the filing date of this federal civil action) are barred by the statute of limitations.

Limitation periods in cases brought under 42 U.S.C. §1983 are determined by reference to the applicable state's statute of limitations and the coordinate tolling rules. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981), *Bianchi v. Bellingham Police Department*, 909 F.2d 1316 (1990). RCW 4.16.080(2) provides a three-year statute of limitations for personal injury to the person or rights of another. This general

statute of limitations for personal injury actions applies to actions brought under 42 U.S.C. § 1983 and § 1985. *McDougal V. County of Imperial*, 942 F.2d 668, 673 (9th Cir. 1991).

Plaintiff argues that the continuing violation doctrine applies in this case, and that therefore, incidents that occurred outside of the three-year limitations period are not barred by the statute of limitations. For a continuing violation to be established, a plaintiff must show a series of related acts or the maintenance of a discriminatory system both before and into the one-year limitations period. *Green v. Los Angeles Cty. Superintendent of Sch.*, 883 F.2d 1472, 1480 (9th Cir.1989). In order to show a series of related acts, a plaintiff must show that alleged incidents occurring before and after the limitations period were inseparable or dependent on each other. *See Flowers v. Carville*, 310 F.3d 1118, 1126 (9th Cir.2002) (explaining that the continuing violations doctrine applies where there is no single incident that can "fairly or realistically be identified as the cause of significant harm). The record shows that the acts identified in this action are separate and independent from one another; the employment applications and interviews at issue were not inseparable or dependent upon one another. Plaintiff has not shown a continuing violation that would render the statute of limitations inapplicable to the incidents at issue in this case.

Plaintiff filed this federal court action on March 13, 2003. Dkt. 1. To the extent that plaintiff alleges his civil rights were violated when he was denied his veterans preference under state law for incidents that occurred before March 13, 2000, those claims are barred by the three-year statute of limitations. The claims against Sherry Baron and M. Smith occurred more than three years before this federal action was filed, and should be dismissed on the basis of the statute of limitations. *See* Dkt. 13, at 3.

C. Claims Arising after March 13, 2000. In his response to the motion, plaintiff attached two letters that appear to relate to incidents that occurred after March 13, 2000. Dkt. 10, Appendix A. The first is a March 28, 2000, letter from Kurt Kaufold and the second is a January 26, 2001, letter from Cindy Horton. Ms. Horton is not a named defendant in this case although plaintiff has filed a motion to add her as a defendant (see below)

To the extent that plaintiff alleges that he applied for state positions, was offered interviews for those positions, and that other persons were selected for those positions, at issue is whether he was denied his constitutional rights when he was denied his veterans preference under RCW 73.16.010.

Defendants contend that plaintiff has not stated a civil rights claim as to the alleged denial of his veteran's preference under state law, arguing that (1) plaintiff had no property interest in an expectation of employment; (2) a tie-breaking preference is not an entitlement because the determination of whether a veteran is equally qualified is dependent upon a subjective assessment of what the requirements are for each job as well as what skills and qualifications the veteran possesses in relation to other qualified applicants; (3) plaintiff had no property interest in continued employment because, as a state employee, he would be terminable at will; and (4) plaintiff's employment interview followed by the right to seek review under RCW 73.16.015 constitutes adequate procedural due process.

Plaintiff argues that he has a statutory right under RCW 73.16.010 conferred by Washington law, and that this law creates a constitutionally protected property interest. The Washington courts decided otherwise ("Contrary to Gossage's claim, however, this preference operates as a tie-breaker among equally qualified candidates, not an absolute preference for veterans once they pass the examination." *Gossage v. State*; Dkt. 8, Appendix A, at 7.) In interpreting state law, federal courts are bound by the pronouncements of the state's highest court. *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 524 (9th Cir.1989). This court should defer to the state court's interpretation of its law.

The court also concurs with defendants' arguments that plaintiff does not have a property interest in an expectation of employment; that a tie-breaking preference does not constitute an entitlement to a particular position; and that, to the extent that plaintiff has any constitutionally protected interest in employment, RCW 73.16.015 constitutes adequate procedural due process.

Defendants' motion to dismiss should be granted as to plaintiff's civil rights claims occurring after March 13, 2000, that are based upon defendants' failure to honor his veteran's preference under RCW 73.16.010.

2. ***Civil Rights Claims for Violating 38 U.S.C. § 4311* (USERRA)**

Plaintiff claims that defendants violated his civil rights when they violated his veteran's preference rights under 38 U.S.C. § 4311. Defendants contend that plaintiff's USERRA claim (1) is barred by the

Eleventh Amendment; (2) is barred by 38 U.S.C. § 4323(b); (3) fails to state a claim; (4) is barred by the Rooker-Feldman Doctrine; and (4) is barred by collateral estoppel.

38 U.S.C. § 4323(b)(2) provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." The USERRA thus vests exclusive jurisdiction over USERRA claims brought by an individual against states in state court. *See Velasquez v. Frapwell*, 165 F.3d 593 (7th Cir. 1999). Moreover, a USERRA claim against a state in federal court is barred by the Eleventh Amendment. *See Velasquez*, 160 F.3d at 389; *Forster v. Saif Corp.*, 23 F. Supp. 1196 (D.C.D.Or. 1998). Because the federal court does not have jurisdiction over plaintiff's USERRA claim, it is unnecessary to reach defendants' arguments that the complaint fails to state a USERRA claim, that the claim is barred by the Rooker-Feldman Doctrine, and that the claim is barred by collateral estoppel.

Defendants' motion to dismiss plaintiff's USERRA claim should be granted and this claim should be dismissed.

3. ***Discrimination Claims Under Title VII***

Plaintiff contends that defendants violated his employment rights under federal law. Defendants contend that plaintiff failed to exhaust administrative remedies and to initiate that claim in a timely manner. Plaintiff has not shown that he exhausted his administrative remedies, as is required in Title VII claims.

It is not clear whether plaintiff intends to pursue Title VII claims in this case, although some of his arguments appear to raise those issues. In his state court action, plaintiff litigated discrimination issues related to the State's failure to hire him due to his race, disability, and status as a convicted felon. *See Gossage v. State*, Dkt. 8, Appendix A. In Washington, the state courts apply the same burden-shifting scheme to cases under RCW 49.60 as the federal courts do to Title VII cases. *Hill v. BCTE Income Fund-I*, 144 Wn.2d 172, 185-86 (2001)(adopting Title VII analysis from *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)). In *Gossage v. State*, the Washington Court of Appeals analyzed the discrimination claims under both federal and state law. Plaintiff's Title VII discrimination claims in this federal case are inextricably intertwined with his state law claims for discrimination. As to claims related to incidents that were raised and litigated in *Gossage v. State*, i.e., those incidents that occurred prior to March 25, 1998, the Rooker-Feldman doctrine bars this court from reviewing plaintiff's Title VII

discrimination claims. Further, as to those incidents that occurred before March 13, 2000, those claims are barred in this federal action by the three year statute of limitations that applies to Title VII claims.

Finally, to the extent that plaintiff intends to pursue claims for incidents that occurred after March 13, 2000, plaintiff has not shown that he has exhausted his administrative remedies, as is required by 42 U.S.C. § 2000(e). To establish federal subject matter jurisdiction, a plaintiff is required to exhaust his or her administrative remedies before seeking adjudication of a Title VII claim. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir.2002). Under Title VII, a plaintiff must exhaust his administrative remedies by filing a timely charge with the EEOC, or the appropriate state agency, thereby affording the agency an opportunity to investigate the charge. 42 U.S.C. § 2000e-5(b); *see also B.K.B.*, 276 F.3d at 1099. Defendants contend that plaintiff did not exhaust his administrative remedies. They therefore raised an issue as to which plaintiff bears the burden; he has failed to show that he exhausted his administrative remedies as to any claim that occurred after March 13, 2000, and this court is without jurisdiction to consider any such claims.

Defendants' motion to dismiss plaintiff's Title VII claims should be granted and these claims should be dismissed.

4. ***Civil Rights Claims for Violation of State Law against Discrimination on Basis of Race, Disability, and Status as Convicted Felon***

In *Gossage v. State*, plaintiff litigated claims of discrimination based upon race, disability, and status as a convicted felon. It is unclear whether the complaint alleges claims based upon race, disability, and status as a convicted felon in this federal court action. In fact, in his response to this motion to dismiss, plaintiff stated that he "never stated specific discrimination claims." Dkt. 10, at p. 2. However, to the extent that plaintiff alleges that defendants violated his civil rights under 42 U.S.C. § 1983 by violating the state laws against discrimination, his claims based upon state law were resolved against him in *Gossage v. State*. Plaintiff's §1983 claims are inextricably intertwined with those state law claims, and in fact depend on resolution of the state claims contrary to the decision of the Washington Court of Appeals in *Gossage v. State*. Plaintiff's § 1983 claims based upon discrimination on the basis of race,

disability, and status as a convicted felon, to the extent plaintiff has raised them in this federal court action, are barred by the Rooker-Feldman Doctrine.

To the extent that plaintiff's claims of discrimination on the basis of race, disability, and status as a convicted felon are based upon violation of state law, those claims are barred by the Rooker-Feldman Doctrine and by res judicata, because those claims were determined in state court.

Defendants' motion to dismiss plaintiff's civil rights claims based upon race, disability, and status as convicted felon should be granted and these claims should be dismissed.

5. ***42 U.S.C. §§ 1981, 1982, 1985, 1986, and 1988 Claims***

To the extent that plaintiff alleges independent causes of action under these sections, such claims are barred by the Rooker-Feldman doctrine because they are inextricably intertwined with the claims already decided by the state courts in *Gossage v. State*. Defendants' motion to dismiss should be granted and these claims should be dismissed.

6. ***Amendment of Complaint***

Before the court dismisses a *pro se* complaint, the court must afford the plaintiff an opportunity to file an amended complaint unless amendment would be futile or where the amended complaint would be subject to dismissal. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987); *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000); *Reddy v. Litton Indus.*, Inc., 912 F.2d 291, 296 (9th Cir.1990); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir 1989). In this case, plaintiff has already filed an amended complaint. Pursuant to the discussion above, the court finds that any further amendment to the complaint would be futile, and the complaint would be subject to dismissal. Specifically, any claims against Marty Cohen and Cindy Horton, even if claims against these individuals would be within the three year limitations period, would be subject to the dismissal on the rationale set forth above. The court should not afford plaintiff the opportunity to file another amended complaint.

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Therefore, it is hereby **ORDERED** that Defendants' Motion to Dismiss (Dkt. 8) is **GRANTED**. Plaintiff's cross-motion for summary judgment (Dkt. 18) is **DENIED**. Plaintiff's Motion to Add Defendant's [sic] (Dkt. 19) is **DENIED**. This case is **DISMISSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 28th day of June, 2003.

/S/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HENRY GOSSAGE,

Plaintiff,

v.

STATE OF WASHINGTON, et al.,

Defendants.

Case No. C03-5138RJB

ORDER

This matter comes before the court on Defendants' Second Motion for Summary Judgment (Dkt. 39); plaintiff's Motion for Summary Judgment (Dkt. 18); and plaintiff's Motion for Sanctions (Dkt. 50). The court has considered the pleadings filed in support of and in opposition to the motions, and the remainder of the file herein.

PROCEDURAL HISTORY

Plaintiff filed a civil action in state court in Washington, contending that the State of Washington discriminated against him due to his disability, race, former convict status, and status as a veteran. Dkt. 8, Appendix A, *Gossage v. State*, No. 26796-9-II, at 2. The trial court dismissed the claims and plaintiff appealed the decision. On July 2, 2002, the Washington Court of Appeals affirmed the ruling of the trial court, holding that (1) the State did not violate state veteran's preference laws, RCW 73.16.010 and RCW 41.04.010, because the employment positions plaintiff sought and for which he was not hired were based on competitive examination, and plaintiff was not equally qualified to the applicants ultimately chosen for the positions; and (2) plaintiff had not stated a prima facie case of discrimination based upon his race (Japanese-American), his disability (psoriasis), or his former convict status. *Id.* According to the

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complaint, review was "terminated in State Court of Appeals 26796-9II [sic] on February 4, 2003." Dkt. 7, at ¶ 2.10.

On March 13, 2003, plaintiff filed this civil action (Dkt. 1), and an amended complaint was filed on March 27, 2003 (Dkt. 7). Plaintiff claims that he is an honorably discharged veteran, and that he has been denied employment with agencies of the State of Washington. He contends that the State of Washington and numerous individually named defendants (1) violated his civil rights under 42 U.S.C. § 1983 when they discriminated against him as a veteran and failed to honor veteran's preferences under state and federal law; (2) violated RCW 73.16.010 when they refused to grant him his veteran's preference right to public employment; (3) discriminated against him in violation of Title VII of the Civil Rights Act of 1964; and (4) violated 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, and 1988, when they discriminated against him. Dkt. 7.

The incidents that are the basis for this complaint relate to positions with the State of Washington for which plaintiff qualified by competitive examination, for which he interviewed, and for which he was not hired. The incidents that occurred up to March 25, 1998, were the subject of plaintiff's state case, *Gossage v. State of Washington*, 112 Wn. App. 412 (2002), *review denied*, 138 Wn.2d 1012 (2003), *cert. denied*, 124 S.Ct. 324 (2003). Some of the incidents upon which plaintiff bases the claims in this case apparently occurred from March 25, 1998, through March 12, 2000. The only incident that occurred after March 12, 2000, against a named defendant, is apparently based on a March 28, 2000, letter to plaintiff from Kurt Kaufold (Dkt. 10). On May 23, 2003, plaintiff filed a motion to add defendants Cindy Horton and Marty Cohen. Dkt. 19. A letter from Ms. Horton is included as an exhibit to Dkt. 10. In this court's June 30, 2003, decision granting defendants' motion for summary judgment, the court denied plaintiff's motion to add defendants. Dkt. 27. In reviewing the pending motions before the court, the court will address the claims involving Ms. Horton as if she were a defendant. The alleged incident involving Mr. Cohen is discussed below in relation to amendment of the complaint.

On April 14, 2003, defendants filed a motion to dismiss, which was later converted to a motion for summary judgment, contending that (1) plaintiff's claims are barred by the Rooker-Feldman Doctrine because they are inextricably intertwined with state court decisions in a state court action that dismissed his causes of action on summary judgment; (2) plaintiff's claims are barred by collateral estoppel; (3) plaintiff's

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cause of action under the Uniform Services Employment and Re-Employment Rights Act (USERRA) is barred by the Eleventh Amendment; (4) with regard to his USERRA claim, plaintiff has failed to state a claim under 42 U.S.C. § 1983; and (5) plaintiff's Title VII claim is barred by his failure to exhaust his administrative remedies in a timely manner. Dkt. 8.

On May 23, 2003, plaintiff filed a cross motion for summary judgment, arguing that (1) the subject matter of this case is intertwined with the state case to the extent that the State of Washington's denial of veteran's preference to plaintiff is ongoing; (2) collateral estoppel does not apply because plaintiff will establish an ongoing pattern of a hostile employment policy against him; (3) plaintiff's hostile work environment claims are not time barred because all acts that constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period; (4) the federal court may review the state's determination of a question of federal law; and (5) plaintiff was not afforded a fair chance to compete for jobs because some of the interviewers were biased against him. Dkt. 18.

On June 30, 2003, the court granted defendants' motion to dismiss, concluding that (1) plaintiff's claims for failure to honor the Veteran's Preference under RCW 73.16.010 should be dismissed because the incidents that occurred through March 25, 1998, were barred by the Rooker-Feldman Doctrine; the incidents arising after March 25, 1998, but before March 13, 2000, were barred by the statute of limitations; and claims arising after March 13, 2000, should be dismissed because the Washington courts decided that RCW 73.16.010 did not operate as an absolute preference for veterans once they pass the examination, plaintiff does not have a property interest in an expectation of employment, a tie-breaking preference does not constitute an entitlement to a particular position, and, to the extent that plaintiff has any constitutionally protected interest in employment, RCW 73.16.015 constitutes adequate procedural due process; (2) plaintiff's civil rights claims based upon 38 U.S.C. § 4311 (USERRA) is barred by the Eleventh Amendment, and in addition, a USERRA claim must be filed in state court; (3) to the extent that plaintiff has alleged a discrimination claim under Title VII, incidents that occurred prior to March 25, 1998 are barred by the Rooker-Feldman Doctrine; those incidents that occurred before March 13, 2000 are barred by the statute of limitations; and claims with regard to any incidents that occurred after March 13, 2000 should be dismissed because plaintiff failed to exhaust his administrative remedies; (4) to the extent that plaintiff alleges that defendants violated his civil rights under 42 U.S.C. § 1983, those claims are

barred by the Rooker-Feldman Doctrine; and (5) plaintiffs' claims under 42 U.S.C. § 1981, 1982, 1985, 1986 and 1988 are barred by the Rooker-Feldman Doctrine. Dkt. 27. In addition, the court denied plaintiff's motions to add Marty Cohen and Cindy Horton as defendants, and denied plaintiff's cross-motion for summary judgment. *Id.* Judgment was entered on July 9, 2003.

Plaintiff appealed the court's order to the Ninth Circuit U.S. Court of Appeals. On May 28, 2004, the Ninth Circuit issued its Mandate, vacating the judgment of the District Court and remanding the case on the basis that the Rooker-Feldman Doctrine does not apply in this case, citing intervening case law, *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003). In its order, the Ninth Circuit stated that "[t]he district court dismissed the majority of Gossage's federal claims pursuant to the Rooker-Feldman doctrine." *Gossage v. State of Washington*, No. 03-355588. The Ninth Circuit did not address any of the other grounds on which the District Court based its decision to grant defendants' motion for summary judgment, nor did the opinion otherwise address plaintiff's claims. The remand was for "further proceedings" without specification as to what those proceedings should be. The Ninth Circuit decision in this case is appended to this order, pursuant to Ninth Circuit FRAP 36-3(c).

Defendants have now filed Defendants' Second Motion for Summary Judgment. Dkt. 39. Plaintiff has renoted his cross-motion for summary judgment (Dkt.18). Dkt. 45. Plaintiff has also filed a Motion for Sanctions. Dkt. 50.

EFFECT OF APPELLATE PROCEEDINGS ON REMAND

In his response to defendants' second motion for summary judgment, in his request to renote his cross-motion for summary judgment, and in his motion for sanctions, plaintiff contends that defendants are barred by collateral estoppel and res judicata from relitigating the issues that were resolved by the Ninth Circuit. Defendants argue that the collateral estoppel and res judicata doctrines are inapplicable in this case. Defendants contend that the law of the case doctrine applies in a case, such as this, in which the appellate court has issued a decision reversing and remanding the case to the district court. Defendants contend that collateral estoppel and res judicata do not apply unless the issues in the case have been litigated and lost in another proceeding.

The law of the case doctrine applies when a case is remanded to a lower court from a higher court. The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed

in all subsequent proceedings in the same case. *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir.1996). In reversing and remanding this case, the Ninth Circuit ruled only on the Rooker-Feldman issue. While the law of the case doctrine applies to explicit decisions as well as implicit ones, it does not extend to issues that the appellate court did not address. *Hegler v. Borg*, 50 F.3d 1472 (9th Cir. 1995); *Liberty Mutual Ins. Co. V. E.E.O.C.*, 691 F.2d 438, 441-42 (9th Cir. 1982)(silence on contested issue left it open for consideration by district court on remand).

Plaintiff contends that the Ninth Circuit rejected all issues raised by defendants in the district court and appellate proceedings, when that court denied defendants' Petition for Rehearing. Dkt. 47, Appendix B.. However, the Ninth Circuit did not rule, either explicitly or implicitly, on any issue other than the application of the Rooker-Feldman Doctrine as it applied to this case. The court denied reconsideration of the order that had reversed and remanded the case; the Ninth Circuit ruled only that the Rooker-Feldman doctrine did not apply in this case, and did not address any other issue raised by defendants in their motion for summary judgment. Under the law of the case doctrine, a district court may reconsider any matter that is not explicitly or implicitly part of the decision of the court of appeals. *United States v. Windom*, 82 F.3d 742, *reh'g granted* 96 F.3d 275, *opinion vacated in part on rehearing* 103 F.3d 523, *cert. denied* 520 U.S. 1221 (7th Cir. 1996). While the Ninth Circuit could have affirmed or reversed the district court on any of the alternative grounds set forth in the district court's order granting defendants' motion for summary judgment, or on grounds not addressed in the district court's order, the court chose not to do so. That means that the Ninth Circuit did not rule in plaintiff's favor on all of the issues; the Ninth Circuit decision resolved only the Rooker-Feldman Doctrine issue, and, pursuant to the law of the case doctrine, this court is bound by the Ninth Circuit's conclusion that the Rooker-Feldman doctrine does not apply to bar plaintiff's claims. Accordingly, this court on remand may revisit issues–other than the Rooker-Feldman Doctrine–that defendants have previously raised in this case.

LEGAL STANDARD FOR SUMMARY JUDGMENT MOTIONS

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient

showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra)*. Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT (DKT. 39)

In their second motion for summary judgment, defendants contend that (1) the court should dismiss plaintiff's civil rights claims based on its prior ruling that the tie-breaking preference afforded to veterans under RCW 73.16.010 does not constitute a federally protected property interest; (2) the court should dismiss the case based on its prior ruling that the right to seek review under RCW 73.16.050 constitutes adequate due process; (3) plaintiff's claims are barred by the doctrine of collateral estoppel; (4) plaintiff's claims are barred by the statute of limitations; (5) the court should dismiss plaintiff's USERRA claim based on its prior ruling that it is barred by the Eleventh Amendment and 38 U.S.C. § 4323(b);

(6) plaintiff's Title VII claim should again be dismissed based upon the court's prior ruling that it is barred by his failure to exhaust administrative remedies and to initiate that claim in a timely manner. Dkt. 39.

In his response opposing defendants' second motion for summary judgment, plaintiff argues that collateral estoppel and res judicata, based upon the decision of the Ninth Circuit in this case, should be applied to prohibit defendants from raising issues that have been previously raised; and his claims are not barred by the statute of limitations because "this is a systemic/serial ongoing continuing employment discrimination by the State in violation of Title VII." Dkt. 47, at 4.

1. ***Civil Rights Claims for Failure to Honor Veteran's Preference under RCW 73.16.010***

Collateral Estoppel. In response to Defendants' First Motion for Summary Judgment, plaintiff clarified seven positions for which he was not hired; he has listed those in Tables A-G in his brief. Dkt. 18, at 12-15. Plaintiff's right to a veteran's preference for each of these seven positions was previously litigated in the state court proceedings in relation to his claims under RCW 73.16.010 and his claims based upon discrimination. The state court found as follows:

> The record before us establishes that taking the entire hiring process into account, Gossage was not equally qualified to those applicants ultimately chosen for the position. The fact that he would have been entitled to a veterans' preference to break a nonexistent tie does not change the outcome of this case.

Gossage v. Washington, 112 Wn. App. at 427. Plaintiff filed a petition for review with the Washington Supreme Court, and a petition for *certiorari* with the United States Supreme Court, both of which petitions were denied.

Collateral estoppel is appropriate when the following elements are met: (1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action. *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir.1992); *see generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, (1979); Charles Alan Wright, Law of Federal Courts 724-26 (5th ed.1994).

In this case, plaintiff had a full and fair opportunity to litigate his veteran's preference in state court. The state courts found against him on his legal argument, and as applied to the facts of his case the seven claims that he raised in this case were actually decided in *Gossage v. State, supra*., the veteran's preference issue was lost in the state court action, and defendants in the present case were parties or in privity with

parties to the state court action.

Plaintiff's constitutional claims are based upon interpretation and application of state law, RCW 73.16.010. In interpreting state law, federal courts are bound by the pronouncements of the state's highest court. *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 524 (9th Cir.1989). This court should defer to the state court's interpretation of its law. Plaintiff is collaterally estopped in this action from re-presenting his veteran's preference argument, and from challenging the application of the veteran's preference to the facts of his case, in the seven incidents that plaintiff raised in *Gossage v. State, supra.*

Statute of Limitations. In their motion for summary judgment, defendants argue that the incidents that occurred before March 13, 2000, the filing date of this federal civil action, are barred by the statute of limitations. This includes all of the claims litigated in *Gossage v. State, supra.*, and incidents up to March 13, 2000.

Limitation periods in cases brought under 42 U.S.C. §1983 are determined by reference to the applicable state's statute of limitations and the coordinate tolling rules. *Rose v. Rinaldi*, 654 F.2d 546 (9th Cir. 1981); *Bianchi v. Bellingham Police Department*, 909 F.2d 1316 (1990). RCW 4.16.080(2) provides a three-year statute of limitations for personal injury to the person or rights of another. This general statute of limitations for personal injury actions applies to actions brought under 42 U.S.C. § 1983 and § 1985. *McDougal V. County of Imperial*, 942 F.2d 668, 673 (9th Cir. 1991).

Plaintiff argues that the continuing violation doctrine applies in this case, and that therefore, incidents that occurred outside of the three-year limitations period are not barred by the statute of limitations. For a continuing violation to be established, a plaintiff must show a series of related acts or the maintenance of a discriminatory system both before and into the one-year limitations period. *Green v. Los Angeles Cty. Superintendent of Sch.*, 883 F.2d 1472, 1480 (9th Cir.1989). In order to show a series of related acts, a plaintiff must show that alleged incidents occurring before and after the limitations period were inseparable or dependent on each other. *See Flowers v. Carville*, 310 F.3d 1118, 1126 (9th Cir.2002) (explaining that the continuing violations doctrine applies where there is no single incident that can "fairly or realistically be identified as the cause of significant harm). The record shows that the acts identified in this action are separate and independent from one another; the employment applications and interviews at issue were not inseparable or dependent upon one another. Plaintiff has not shown a

continuing violation that would render the statute of limitations inapplicable to the incidents at issue in this case.

Plaintiff filed this federal court action on March 13, 2003. Dkt. 1. Plaintiff's claims that his civil rights were violated when he was denied his veterans preference under state law for incidents that occurred before March 13, 2000, are barred by the three-year statute of limitations. All claims, with the exception of claims against Kurt Kaufold and Cindy Horton should be dismissed as barred by the statute of limitations.

Substantive Due Process Claim. In his response to defendants' first motion for summary judgment, plaintiff attached two letters that appear to relate to incidents that occurred after March 13, 2000. Dkt. 10, Appendix A. The first is a March 28, 2000, letter from Kurt Kaufold and the second is a January 26, 2001, letter from Cindy Horton. It appears that the incidents involving defendant Kurt Kaufold occurred after plaintiff litigated claims in *Gossage v. State, supra*, and within the limitations period. Although Cindy Horton is not a named defendant in this case, plaintiff has sought to add her as a defendant; the court will address claims against Ms. Horton, in the interests of fairness to plaintiff. All of the claims against the other defendants in this case are either barred by the statute of limitations, or plaintiff is collaterally estopped from raising the claims by the decision in *Gossage v. State, supra*. While the analysis set forth herein directly applies to the claims against Mr. Kaufold and Ms. Horton, it also serves as an alternative basis for dismissal of plaintiff's civil rights claims against all defendants.

Plaintiff claims that defendants violated his civil rights by failing to grant him a veterans' preference under RCW 73.16.010. He argues that, pursuant to RCW 73.16.010, once he met the qualifications for a position, the appointing authority was required to select him for the position over non veterans who had also met the qualifications for the position. *See Gossage v. State*, 112 Wn. App. 412, 422 (2002). Dkt. 41, Appendix B, Petition for a Writ of Certiorari, at 16. He contends that, in each instance plead in his amended complaint, the appointing authority selected a non veteran for the position for which he applied, thereby violating his constitutional rights.

An individual may have a property interest in government employment protected by the fifth amendment. *See Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972). To have a property interest in government employment, the employee must demonstrate an entitlement to the job. Entitlements arise

from rules or understandings from independent sources, such as statutes, regulations, and ordinances, or express or implied contracts. *Orloff v. Cleland*, 708 F.2d 372, 377 (9th Cir.1983) (quoting *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709).

In order to establish a due process claim, plaintiff must first show that he had a protected property interest in the job. *See Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 331 (9th Cir.1995) (citing *Board of Regents*, 408 U.S. 564 (1972)). To have a property interest, plaintiff must have more than an abstract need or desire for it. *Green v. Babbit*, 64 F.3d 1266, 1271 (9th Cir.1995) (quoting *Roth*, 8 U.S. at 577). He must have more than a unilateral expectation of it. *Id.* He must, instead, have a legitimate claim of entitlement to it. *Id.*

In this case, the state court determined that the veteran's preference "operates as a tie-breaker among equally qualified candidates, not an absolute preference for veterans once they pass the examination." *Gossage v. State of Washington*, 117 Wn.App. at 427. The court further held that "in competitive examinations, veterans who are not entitled to preference under RCW 41.04.010 but who are entitled to preference under RCW 73.16.010 shall be afforded the full benefit of the latter privilege: Where two or more candidates for employment have equal qualifications, including performance on examinations, interviews, and other testing, preference must be given the veteran." *Id.*

Plaintiff contends that he had a constitutionally protected property interest, under state law, to an absolute preference as a veteran, once he met the qualifications for the position. The state court held that the veterans' preference operates only as a tie breaker among equally qualified candidates, not an absolute preference. In interpreting state law, federal courts are bound by the pronouncements of the state's highest court. *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 524 (9th Cir.1989). This court should defer to the state court's interpretation of its law.

Plaintiff has not demonstrated that he had an entitlement to any of the jobs that he applied for. Defendants have shown that plaintiff does not have a constitutionally protected property interest to an absolute preference as a veteran, once he met the qualifications for the positions that were filled by competitive examination. Defendants' motion to dismiss should be granted as to plaintiff's claim based upon substantive due process.

Procedural Due Process Claim. While the analysis set forth herein directly applies to the claims

against Mr. Kaufold and Ms. Horton, it also serves as an alternative basis for dismissal of plaintiff's civil rights claims against all defendants.

The Fourteenth Amendment prevents a state from depriving a person of life, liberty, or property without due process of law. Assuming that plaintiff has a constitutionally protected property interest in prospective employment, the procedures that satisfy due process in a given situation depend upon an analysis of the particular case in accord with the three part balancing test outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Factors to be considered in determining the process due in a given situation require an analysis of (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

In this case, plaintiff's interests to be preferred for employment under RCW 73.16.010 are minimal, since this statute does not afford an absolute preference in employment but only provides for a tie-breaking preference when the veteran's qualifications are substantially equal to other non-veteran applicants. Second, the risk of erroneous deprivation of a veteran's preference is protected by the procedures that were afforded in this case. Plaintiff was given an interview and an opportunity to be heard regarding his qualifications for the competitive positions for which he applied. RCW 73.16.015 ("[a]ny veteran entitled to the benefits of RCW 73.16.010 may enforce his or her rights hereunder by civil action in superior court.") provides plaintiff with the opportunity to seek judicial review in the state courts. Additional procedural safeguards would not be practical before a hiring decision is made. Third, requiring additional review and opportunity to be heard would place additional costs and delays on the state, and it is not clear what additional information would be provided for the employer's consideration that could not have already been presented at the initial interview. In the context of the application of RCW 73.16.010, plaintiff was afforded adequate procedural due process.

Defendants have shown there is no unresolved material issue of fact as to plaintiff's claim that he was denied his civil rights when defendants failed to honor the veteran's preference under RCW 73.16.010. The court should grant defendants' motion for summary judgment and dismiss this claim.

2. *Civil Rights Claims for Violating 38 U.S.C. § 4311* (USERRA)

Plaintiff claims that defendants violated his civil rights when they violated his veteran's preference rights under 38 U.S.C. § 4311. Defendants contend that plaintiff's USERRA claim (1) is barred by the Eleventh Amendment; and (2) is barred by 38 U.S.C. § 4323(b).

A USERRA claim against a state in federal court is barred by the Eleventh Amendment. *See Velasquez*, 160 F.3d at 389. *See also Forster v. Saif Corp.*, 23 F. Supp. 1196 (D.C.D.Or. 1998). Moreover, 38 U.S.C. § 4323(b)(2) provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." The USERRA thus vests exclusive jurisdiction over USERRA claims brought by an individual against states in state court. *See Velasquez v. Frapwell*, 165 F.3d 593 (7th Cir. 1999). Defendants' motion to dismiss plaintiff's USERRA claim should be granted and this claim should be dismissed.

3. *Discrimination Claims Under Title VII*

Plaintiff contends that defendants violated his employment rights under federal law. Defendants contend that plaintiff failed to exhaust administrative remedies and to initiate that claim in a timely manner. Plaintiff has not shown that he exhausted his administrative remedies, as is required in Title VII claims.

It is not clear whether plaintiff intends to pursue Title VII claims in this case, although some of his arguments appear to raise those issues. In his state court action, plaintiff litigated discrimination issues related to the State's failure to hire him due to his race, disability, and status as a convicted felon. *See Gossage v. State, supra* In Washington, the state courts apply the same burden-shifting scheme to cases under RCW 49.60 as the federal courts do to Title VII cases. *Hill v. BCTE Income Fund-I*, 144 Wn.2d 172, 185-86 (2001)(adopting Title VII analysis from *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)). To the extent that plaintiff intends to pursue claims under Title VII, plaintiff has not shown that he has exhausted his administrative remedies, as is required by 42 U.S.C. § 2000(e). To establish federal subject matter jurisdiction, a plaintiff is required to exhaust his or her administrative

remedies before seeking adjudication of a Title VII claim. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir.2002). Under Title VII, a plaintiff must exhaust his administrative remedies by filing a timely charge with the EEOC, or the appropriate state agency, thereby affording the agency an opportunity to investigate the charge. 42 U.S.C. § 2000e-5(b); *see also B.K.B.*, 276 F.3d at 1099. Defendants contend that plaintiff did not exhaust his administrative remedies. They therefore raised an issue as to which plaintiff bears the burden; he has failed to show that he exhausted his administrative remedies as to any claim that occurred after March 13, 2000, and this court is without jurisdiction to consider any such claims.

Defendants' motion to dismiss plaintiff's Title VII claims should be granted and these claims should be dismissed.

4. Civil Rights Claims for Violation of State Law against Discrimination on Basis of Race, Disability, and Status as Convicted Felon

In *Gossage v. State*, plaintiff litigated claims of discrimination based upon race, disability, and status as a convicted felon. In this action in federal court, plaintiff does not appear to be pursuing those claims. In fact, in his response to this motion to dismiss, plaintiff stated that he "never stated specific discrimination claims." Dkt. 10, at p. 2.

5. Qualified Immunity

Defendants contend that they are entitled to qualified immunity as to plaintiff's claim that he has a due process property interest under RCW 73.16.010.

Defendants in a § 1983 action are entitled to qualified immunity from damages for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The existence of qualified immunity generally turns on the objective reasonableness of the actions, without regard to the knowledge or subjective intent of the particular official. *Id.* at 819. Whether a reasonable officer could have believed his or her conduct was proper is a question of law for the court and should be determined at the earliest possible point in the litigation. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872-73 (9th Cir. 1993).

In analyzing a qualified immunity defense, the Court must determine: (1) whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to the party asserting the injury; and (2) whether the right was clearly established when viewed in the specific context of the case. *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). "The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* The privilege of qualified immunity is an immunity from suit rather than a mere defense to liability, and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. *Id.*

The right at issue in this case is the due process constitutional right to an absolute veteran's preference, in the context of a competitive examination, once an applicant meets the minimum qualifications for the position. Based upon the record, plaintiff has not shown that there is such a right. Nor is there clearly established law recognizing such a property interest, or outlining the processes that would be constitutionally due in the event that such a property interest existed. Defendants are entitled to qualified immunity on plaintiff's claim that his due process rights were violated when he was not afforded an absolute veteran's preference, in the context of a competitive examination, when he met the minimum qualifications for the positions.

6. ***Amendment of Complaint***

Before the court dismisses a *pro se* complaint, the court must afford the plaintiff an opportunity to file an amended complaint unless amendment would be futile or where the amended complaint would be subject to dismissal. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987); *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000); *Reddy v. Litton Indus.*, Inc., 912 F.2d 291, 296 (9th Cir.1990); *Moore v. Kayport Package Express. Inc.*, 885 F.2d 531, 538 (9th Cir.1989). In this case, plaintiff has already filed an amended complaint. On May 23, 2003, plaintiff filed a motion to further amend the complaint by adding Marty Cohen and Cindy Horton as defendants (Dkt. 19); the court denied that motion (Dkt. 27). In the interest of fairness to plaintiff, the court has again reviewed that motion. Plaintiff has not provided a sufficient basis for naming Mr. Cohen as a defendant. The basis upon which plaintiff alleges a claim against Mr. Cohen is that he scheduled an interview with plaintiff; this is insufficient to state a claim against Mr. Cohen, and in any event, defendants would be entitled to summary judgment, on the alternative bases

discussed above, on a claim that Mr. Cohen failed to hire him for a position, following an interview. Further, as discussed above, amendment of the complaint to add Ms. Horton as a defendant would be futile. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987) (pro se litigants must be given leave to amend complaint unless it is absolutely clear that amendment would be futile). Any further amendment to the complaint would be futile, and the complaint would be subject to dismissal. The court should not afford plaintiff the opportunity to file another amended complaint.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DKT. 18)

On August 30, 2004, plaintiff filed a Renote for Motion for Summary Judgment, requesting that the court again review his motion for summary judgment that the court denied in the court's June 30, 2003 order. Dkt. 45. The court has re-reviewed the original motion, and plaintiff's argument in Dkt. 45. The court has addressed above the issues he raises in his pleadings. His motion for summary judgment (Dkt. 18) is without merit and should be denied.

PLAINTIFF'S MOTION FOR SANCTIONS (DKT. 50)

On September 8, 2004, plaintiff filed a motion for sanctions, requesting that the court impose sanctions on defendants for misinforming the court of the proceedings in the Ninth Circuit, attempting to relitigate the decision of the Ninth Circuit, raising frivolous arguments already settled by the Ninth Circuit, fabricating inaccurate conclusions from factual evidence, multiplying the proceedings in this court, wasting judicial resources, and intentionally increasing the cost of the litigation. Dkt. 50.

The effect of the decision of the Ninth Circuit is addressed above. Defendants were not foreclosed from raising the issues included in the second motion for summary judgment. The arguments were not frivolous, and defendants did not waste judicial resources. Plaintiff's motion for sanctions should be denied.

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Therefore, it is hereby **ORDERED** that Defendants' Second Motion for Summary Judgment (Dkt. 39) is **GRANTED**. Plaintiff's Motion for Summary Judgment (Dkt. 18) is **DENIED**. Plaintiff's Motion for Sanctions (Dkt. 50) is **DENIED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 4th day of October, 2004.

/S/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

APPENDIX C

C1	Assistant Director Letter	February 23, 1990
C2	Compliance Inspections	1991-1992
C3	Performance Evaluations	1990-1991
C4	Annual Inspection Evaluation	1990-1991

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

Division of Industrial Safety and Health • 805 Plum S.E. • Olympia, Washington 98504

February 23, 1990

TO: Herb Rogers
Assistant Director HC-140
Administrative Services

FROM: Alan Paja
Acting Assistant Director HC-402

SUBJ: **Henry Gossage, Industrial Hygienist 2-Position #1543**

The appointment notice for Henry Gossage, Industrial Hygienist 2, should have indicated a starting salary of $2412 per month which is Range 44 Step I. This information was inadvertently left off the notice.

Mr. Gossage moved into this position from a Chemist 2 with a salary of $2412 a month. Due to Henry's previous salary and his familiarity with Industrial Hygiene activities, gained from working in the laboratory, it was intended that Mr. Gossage's salary as an Industrial Hygienist 2 be approved at Range 44, Step I $2412, effective January 23, 1990 (the appointment date).

Thank you for your attention in this matter.

ASP/dk2.29

cc: Steve Cant
John Geppert

RECEIVED
MAR 02 1990
L & I SAFETY

C1

Number of Inspections by Industrial Hygienst
01/01/91 thru 01/31/92

Position	ID	Name	Inspection Total	Inspection No	In Comp.	Violation Instances W	Violation Instances RS/S	Violation Instances RG/G
			REGION 1					
IH2	B0963	W. Brodie	40	0	4	0	170	253
IH3	N2894	N. Beaudet	32	1	5	0	177	97
IH3	W9482	J. Wolf	65	0	21	0	37	108
			REGION 2					
IH3	C6782	M. Close	33	0	4	0	7	179
IH3	D0427	M. Davis	91	6	20	0	95	220
IH3	K3666	E. Kirkpatrick	46	2	11	0	71	129
IH3	L1680	J. Leons	48	2	18	0	54	139
IH3	R5632	J. Rees	36	0	5	12	63	241
IH3	S2737	T. Schaffer	59	6	17	0	4	118
IH3	S4677	D. Stahl	54	1	36	0	7	71
IH3	T1286	E. Tabb	23	0	9	0	29	288
IH2	W6867	K. Waddell	28	0	9	1	8	51
IH2	W8624	M. Wilson	37	4	15	0	8	44
			REGION 3					
IH2	G3723	H. Gossage	41	3	0	0	93	198
IH3	J9841	D. Johnson*	20	1	5	0	14	102
IH3	K5520	J. Kurina**	1	0	0	0	2	10
IH4	L6601	D. Lofgren	10	0	2	0	11	45
IH2	T3137	R. Takase	38	1	4	0	45	312
IH2	W2281	T. Walley	36	2	3	2	62	369
			REGION 4					
IH3	A9135	A. Anderson	24	0	13	0	0	36
IH3	D4008	W. Drapeau**	4	0	0	0	5	18
IH3	H5688	G. Hamilton	49	0	14	0	52	93
IH3	H	D. Hough**						
IH2	L0990	D. Lindaeau	28	4	6	0	6	252
IH3	P2874	R. Podhora	31	1	17	0	15	60
			REGION 5					
IH3	C9670	C. Stuart	16	0	4	0	20	94
IH3	H8213	T. Hentges	64	2	25	0	8	262
IH3	J3948	K. Jaten	47	0	17	0	27	72
IH3	W5369	M. Weis	51	0	30	0	39	112
IH3	Y5311	C. Young#	18	1	5	0	28	47

* left 7-91 ** L&I New Hire

\# IH-2 Promotional from Western State

7 Industrial Hygienst-2's + 23 Industrial Hygienst-3's = 30 IH's

G-3723 Totals for 91-92

# of Inspections...10th in the State

ofInspection-In Compliance-No Inspection....2nd in the State

Serious/Repeat Serious Violation Instances....4th in the State

General/Repeat General Violation Instances....9th in the State

Total Violation Instances.....7th in the State

C2

Prepared by H. Gossage
Submitted 7/25/91

Henry Gossage

Inspections Closed June 1990 - May 1991

	Inspections	Violations					
		W	FTA	R	S	G	V/I
Gossage	54	0	11	7	29	221	4.96
1991 Briefing Book Health Summary	863*	20	15	78	271	2876	3.78

HG Inspection/Month= 4.5
HG Violations/Inspection= 4.96

State Violations/Inspection
3261/863* = 3.78
3261/1333 = 2.45

*- 1333 inspections minus 470 inspections in compliance

W- Willful
FTA- Failure to Abate
R- Repeat
S- Serious
G- General

Significant Inspections Which Have Impact

Olympic College	Developed General Programs for College
Y-Pay More	Lead/Asbestos/ Perchloroethylene
Albertson's	Contact Dermatitus/Produce Dept.
Atochem	Accident Investigation for Hydrogen Sulfide...2 Chem.Eng. injured
Cambridge Mgmt.	General Programs
Western State Hospital	Triple Complaint....Heat Stress
Ultra Quiet Floors	Asbestos removal
Simpson	Comprehensive Inspection in Progress

3
C2-2

FORM S.F. 9128 (9/78)

STATE OF WASHINGTON EMPLOYEE PERFORMANCE EVALUATION

NOTE: This is a triple-use form. Mark the appropriate box below.

- [ ] SUPERVISOR'S WORKSHEET (To be prepared before the evaluation with the employee)
- [ ] EMPLOYEE'S WORKSHEET (To be prepared before the evaluation with your supervisor)
- [X] PERFORMANCE EVALUATION CONFERENCE REPORT

EVALUATION PERIOD

FROM 1-23-90 TO 10-19-90

PURPOSE OF APPRAISAL

- [ ] ANNUAL REVIEW
- [ ] PROBATIONARY REVIEW
- [ ] TRIAL SERVICE REVIEW
- [X] OTHER Special

DOES THIS EMPLOYEE HAVE SUPERVISORY RESPONSIBILITY?

- [ ] YES
- [X] NO

JOB DESCRIPTION REVIEW

- [X] THE CLASSIFICATION QUESTIONNAIRE HAS BEEN REVIEWED IN DETAIL

EMPLOYEE'S NAME (Last, First, Middle Initial)	JOB CLASSIFICATION TITLE		SOCIAL SECURITY NO.
Gossage, Henry E.	Industrial Hygienest II		534-58-3723
AGENCY	DIVISION/SECTION	ANNIVERSARY DATE	SUPERVISOR'S NAME
Labor & Industries	Ind. Safety & Health	1-23-90	Don J. Lofgren

SECTION C: PERFORMANCE FOR THE RATING PERIOD

ACCOMPLISHMENT OF JOB REQUIREMENTS: Performance Dimension A

ELEMENTS:

- QUANTITY OF WORK —
- COMPLETION OF WORK ON TIME —
- QUALITY AND ACCURACY OF WORK COMPLETED —
- INITIATIVE IN ACCEPTING RESPONSIBILITY —
- OTHER ELEMENTS (TO BE DEFINED BY EMPLOYEE AND/OR SUPERVISOR) —

COMMENTS

See Attached

OVERALL RATING (Check Only One)

- [ ] FAR EXCEEDS NORMAL REQUIREMENTS
- [ ] EXCEEDS NORMAL REQUIREMENTS
- [X] MEETS NORMAL REQUIREMENTS
- [ ] MEETS MINIMUM REQUIREMENTS
- [ ] FAILS TO MEET MINIMUM REQUIREMENTS

JOB KNOWLEDGE AND COMPETENCE: Performance Dimension B

ELEMENTS:

- KNOWLEDGE OF WORK UNIT PURPOSES, GOALS AND DUTIES —
- COMMAND OF SKILLS NEEDED FOR EMPLOYEE'S POSITION —
- COMMITMENT TO IMPROVING SERVICES TO THE PUBLIC —
- ADAPTABILITY TO NEW DEVELOPMENTS IN THE JOB —
- OTHER ELEMENTS (TO BE DEFINED BY EMPLOYEE AND/OR SUPERVISOR) —

COMMENTS

See Attached

OVERALL RATING (Check Only One)

- [ ] FAR EXCEEDS NORMAL REQUIREMENTS
- [ ] EXCEEDS NORMAL REQUIREMENTS
- [X] MEETS NORMAL REQUIREMENTS
- [ ] MEETS MINIMUM REQUIREMENTS
- [ ] FAILS TO MEET MINIMUM REQUIREMENTS

JOB RELIABILITY: Performance Dimension C

ELEMENTS:

- DEPENDABILITY AND RELIABILITY REGARDING WORK INSTRUCTIONS —
- PURSUIT OF EFFICIENCY AND ECONOMY IN THE USE OF STATE RESOURCES —
- DEGREE OF NEED FOR SUPERVISION —
- EFFICIENCY IN THE USE OF WORK TIME —
- OTHER ELEMENTS (TO BE DEFINED BY EMPLOYEE AND/OR SUPERVISOR) —

COMMENTS

See Attached

OVERALL RATING (Check Only One)

- [ ] FAR EXCEEDS NORMAL REQUIREMENTS
- [ ] EXCEEDS NORMAL REQUIREMENTS
- [X] MEETS NORMAL REQUIREMENTS
- [ ] MEETS MINIMUM REQUIREMENTS
- [ ] FAILS TO MEET MINIMUM REQUIREMENTS

B C3-1

SECTION II. WORK PLAN FOR THE FUTURE

NOTE: BOTH THE EMPLOYEE AND THE SUPERVISOR SHOULD FILL OUT SECTION II ON THEIR WORKSHEETS

WORK PLAN FOR PERFORMANCE AND PLANNING EMPLOYEE DEVELOPMENT OF _____
EMPLOYEE'S NAME

FOR PERFORMANCE ON THE PRESENT JOB, THIS EMPLOYEE SHOULD CONCENTRATE ON THE FOLLOWING PERFORMANCE ELEMENTS:

See Attached

FOR LONG TERM DEVELOPMENT, THIS EMPLOYEE SHOULD CONSIDER THE FOLLOWING COURSE OF ACTION:

See Attached

SECTION III. REVIEW

REVIEWER'S COMMENTS

I recommend that a writing course be incorporated into Henry's training plan for this coming year.

have reviewed this report. REVIEWER'S SIGNATURE John T. Smith	DATE 12-24-90		
his report is based on my best judgment of this employee's job performance. EVALUATING SUPERVISOR'S SIGNATURE	DATE 12/24/90	I have received a copy of this evaluation and it has been discussed with me. EMPLOYEE'S SIGNATURE	DATE 11-30-90

M S.F. 9128 (9/78)

(12). C301

FORM S.F. 9128 (9/78)

EMPLOYEE PERFORMANCE EVALUATION

NOTE: This is a triple-use form. Mark the appropriate box below.

- ☐ SUPERVISOR'S WORKSHEET (To be prepared before the evaluation with the employee)
- ☐ EMPLOYEE'S WORKSHEET (To be prepared before the evaluation with your supervisor)
- ☒ PERFORMANCE EVALUATION CONFERENCE REPORT

RECEIVED ... LABOR & IND...

EVALUATION PERIOD
FROM 6-1-90 TO 5-31-91

PURPOSE OF APPRAISAL
- ☒ ANNUAL REVIEW
- ☐ PROBATIONARY REVIEW
- ☐ TRIAL SERVICE REVIEW
- ☐ OTHER _____

DOES THIS EMPLOYEE HAVE SUPERVISORY RESPONSIBILITY?
- ☐ YES
- ☒ NO

JOB DESCRIPTION REVIEW
- ☒ THE CLASSIFICATION QUESTIONNAIRE HAS BEEN REVIEWED IN DETAIL

EMPLOYEE'S NAME (Last, First, Middle Initial)	JOB CLASSIFICATION TITLE	SOCIAL SECURITY NO.
GOSSAGE, Henry E.	Industrial Hygienest II	534-58-3723

AGENCY	DIVISION/SECTION	ANNIVERSARY DATE	SUPERVISOR'S NAME
Labor & Industries	D. I. S. H.	5-25-88	Don Lofgren

SECTION C. PERFORMANCE FOR THE RATING PERIOD

ACCOMPLISHMENT OF JOB REQUIREMENTS: Performance Dimension A

ELEMENTS:
- QUANTITY OF WORK —
- COMPLETION OF WORK ON TIME —
- QUALITY AND ACCURACY OF WORK COMPLETED —
- INITIATIVE IN ACCEPTING RESPONSIBILITY —
- OTHER ELEMENTS (TO BE DEFINED BY EMPLOYEE AND/OR SUPERVISOR) —

COMMENTS: SEE ATTACHED

OVERALL RATING (Check Only One)
- ☐ FAR EXCEEDS NORMAL REQUIREMENTS
- ☐ EXCEEDS NORMAL REQUIREMENTS
- ☒ MEETS NORMAL REQUIREMENTS
- ☐ MEETS MINIMUM REQUIREMENTS
- ☐ FAILS TO MEET MINIMUM REQUIREMENTS

JOB KNOWLEDGE AND COMPETENCE: Performance Dimension B

ELEMENTS:
- KNOWLEDGE OF WORK UNIT PURPOSES, GOALS AND DUTIES —
- COMMAND OF SKILLS NEEDED FOR EMPLOYEE'S POSITION —
- COMMITMENT TO IMPROVING SERVICES TO THE PUBLIC —
- ADAPTABILITY TO NEW DEVELOPMENTS IN THE JOB —
- OTHER ELEMENTS (TO BE DEFINED BY EMPLOYEE AND/OR SUPERVISOR) —

COMMENTS: SEE ATTACHED

OVERALL RATING (Check Only One)
- ☐ FAR EXCEEDS NORMAL REQUIREMENTS
- ☐ EXCEEDS NORMAL REQUIREMENTS
- ☒ MEETS NORMAL REQUIREMENTS
- ☐ MEETS MINIMUM REQUIREMENTS
- ☐ FAILS TO MEET MINIMUM REQUIREMENTS

JOB RELIABILITY: Performance Dimension C

ELEMENTS:
- DEPENDABILITY AND RELIABILITY REGARDING WORK INSTRUCTIONS —
- PURSUIT OF EFFICIENCY AND ECONOMY IN THE USE OF STATE RESOURCES —
- DEGREE OF NEED FOR SUPERVISION —
- EFFICIENCY IN THE USE OF WORK TIME —
- OTHER ELEMENTS (TO BE DEFINED BY EMPLOYEE AND/OR SUPERVISOR) —

COMMENTS: SEE ATTACHED

OVERALL RATING (Check Only One)
- ☐ FAR EXCEEDS NORMAL REQUIREMENTS
- ☒ EXCEEDS NORMAL REQUIREMENTS
- ☐ MEETS NORMAL REQUIREMENTS
- ☐ MEETS MINIMUM REQUIREMENTS
- ☐ FAILS TO MEET MINIMUM REQUIREMENTS

BEST AVAILABLE COPY

SECTION III: WORK PLAN FOR THE FUTURE

NOTE: BOTH TH[illegible]PLO[illegible]D THE SUPERVISOR SHOULD FILL OUT SE[illegible]N II [illegible]IR WORKSHEETS

WORK PLAN FOR PERFORMANCE AND PLANNING EMPLOYEE DEVELOPMENT OF Henry Gossage
EMPLOYEE'S NAME

FOR PERFORMANCE ON THE PRESENT JOB, THIS EMPLOYEE SHOULD CONCENTRATE ON THE FOLLOWING PERFORMANCE ELEMENTS:

SEE ATTACHED

FOR LONG TERM DEVELOPMENT, THIS EMPLOYEE SHOULD CONSIDER THE FOLLOWING COURSE OF ACTION:

SEE ATTACHED

SECTION IV: REVIEW

REVIEWER'S COMMENTS

I have reviewed this report. REVIEWER'S SIGNATURE	DATE 8/5/91		
This report is based on my best judgment of this employee's job performance EVALUATING SUPERVISOR'S SIGNATURE	DATE 8/1/91	I have received a copy of this evaluation and it has been discussed with me. EMPLOYEE'S SIGNATURE Henry Gossage	DATE 7-30-91

FORM S.F. 9128 (9/78)

C3-2

Dept. of Labor & Industries
Div. of Industrial Safety & Health
HC402
Olympia WA 98504

WISHA ACCOMPANIED VISIT SPOT CHECK REVIEW FORM

ACCOMPANIED VISIT / SPOT CHECK REVIEW CHECKLIST

1. Region: 3
2. Office: Tacoma
3. Inspector: Henry Gossage
4. Supervisor: D. Lofgren
5. Date of spot check:
6. Date of L & I Inspection: 10/5/90
7. Name of Employer: New West Gypsum Address: 1321 54th Ave E. City: Fife, WA Zip: 98424

8. Report Number: 117524260
9. Comments: suggestion made for improving opening and wrap up of A/P
10. Type of Inspection: ☐ Initial ☐ Follow-up ☐ OHR ☐ Accident ☒ Other (identify) ~~Complaint~~ ref. from local govt

I. Entrance Procedures	Yes	No	N.A.	Remarks
A. Was the time of entry during normal plant work hours?	✓			discuss w/ mgr SGH to employee
B. Were credentials presented to management's representative?	✓			- "checklist item" ✓
C. Was this a complaint inspection?		✓		- objective/not subj. wpg ✓
1. If yes, was copy of complaint given to the employer?				- enforcement base for Vol. comp.
2. Was identity of complaintant protected? (if requested)				- written allegs in objective & fair manner
II. Opening Conference				- penalties - max value ✓ adjustments
A. Did the Inspector take proper measures to achieve approp. mgt. representation at the opening conference?	✓			- a lot too much like ✓
B. Did the Inspector include the following items in the opening conference:				- worker training - ? ✓
1. Purpose, nature, and scope of inspection?	✓			
2. Legal authority for inspection?	✓			
3. Provision for protection of trade secrets?	✓			
4. Request for employer representative to accompany Inspector during walkaround?	✓			
5. Request for employee representative to accompany Inspector during walkaround?	✓			
6. Copy of appropriate standards and information material provided to employer.	✓			
7. Review of employer's safety program.	✓			
III. Employee rights				
A. Did workers have an employee representative?				
B. If workers have employee representative, did the Inspector:				
1. Take an employee representative for a walkaround inspection?				
2. Inform employee representative of employee's rights under law?				
3. Give employee representative opportunities to point out hazards?				
4. Interview other employees?				
C. If not accompanied by employee representative, did Inspector conduct appropriate employee interview?				
1. List names of employees interviewed under remarks column?				
D. Did Inspector inform interviewed employees of employee's rights under the law?				

- very → moves of down. take notes?

walkaround procedures -

discuss eg. controls; hazards -

→ documentation → who typed out of file, where.

416-009-000 accompanied visit spot check review 11-88

C4-1

discussed w/ Henry

Dept. of Labor & Industries
Div. of Industrial Safety & Health
HC402
Olympia WA 98504

WISHA ACCOMPANIED VISIT SPOT CHECK REVIEW FORM

ACCOMPANIED VISIT / SPOT CHECK REVIEW CHECKLIST

1. Region: 3
2. Office: Tacoma
3. Inspector: Henry Gossage
4. Supervisor: D. Lofgren
5. Date of spot check: 1 / 1
6. Date of L & I Inspection: 7-17-91 - 6-5-92
7. Name of employer: Simpson Tacoma Kraft
Address
State Zip

8. Report Number: III 524435
9. Comments

10. Type of Inspection
☐ Initial ☐ Follow-up ☐ CHR
☐ Accident ☒ Other (identify) ☒ Complaint

I. Entrance Procedures	Yes	No	N.A.	Remarks
A. Was the time of entry during normal plant work hours?	✓			
B. Were credentials presented to management's representative?	✓			
C. Was this a complaint inspection?	✓			
1. If yes, was copy of complaint given to the employer?	✓			
2. Was identity of complaintant protected? (if requested)	✓			
II. Opening Conference				
A. Did the Inspector take proper measures to achieve approp. mgt. representation at the opening conference?	✓			
B. Did the Inspector include the following items in the opening conference:				
1. Purpose, nature, and scope of inspection?	✓			
2. Legal authority for inspection?	✓			
3. Provision for protection of trade secrets?				
4. Request for employer representative to accompany Inspector during walkaround?	✓			
5. Request for employee representative to accompany Inspector during walkaround?	✓			
6. Copy of appropriate standards and information material provided to employer.				
7. Review of employer's safety program.	✓			
III. Employee rights				
A. Did workers have an employee representative?	✓			
B. If workers have employee representative, did the Inspector:				
1. Take an employee representative for a walkaround inspection?	✓			
2. Inform employee representative of employee's rights under law?				
3. Give employee representative opportunities to point out hazards?	✓			
4. Interview other employees?	✓			
C. If not accompanied by employee representative, did Inspector conduct appropriate employee interview?				
1. List names of employees interviewed under remarks column.?				
D. Did Inspector inform interviewed employees of employee's rights under the law?				

- needed more pre-inspection review on hazards, & standards, process common to pulp mills
- took initiative (good!) to and opened inspections on contractors seen violating stds.
- participated in other inspections
- we all need work on this

F416-009-000 accompanied visit spot check review 11-88

C4-2

Division of Industrial Safety and Health
P.O. Box 207, Olympia, WA 98507-0207

CORRECTIVE NOTICE OF REDETERMINATIO

This Corrective Notice of Redetermination is issued following the appeal of Citation and Notice No. 111524435 relating to inspection no. 111524435 issued on 8-26-91 and the reassumption of jurisdiction over the subject matter of the appeal according to RCW 49.17.140(3).

Citation and Notice Appeal Received on 9-13-91 Reassumption Hearing Held on 10-28-91

Corrective Notice of Redetermination Issued

Inspector I.D. G3723 | Region 3 | Safety / Health / Speci

A copy of this Corrective Notice of Redetermination must be prominently posted upon receipt at or near each place a violation referred to in the Corrective Notice of Redetermination occurred. It must remain posted until all violations cited therein are corrected, or for three (3) working days, whichever period is longer. Reference WAC 296-350-060(2).

The redeterminations following reassumption of jurisdiction by the Department are listed below.

Citation & Item No.	Type of Violation	Code Violation	Abatement Date	Decision	Penalty Assessment
1-1	Serious	WAC 296-79-230(1)(a)	9-4-91	Not Appealed	$800.00
1-2	Serious	WAC 296-79-140(3)(b)	11-26-91	Not Appealed	$720.00
1-3	Serious	WAC 296-62-09027(8)	11-26-91	Affirm	$2700.00
1-4	Serious	WAC 296-62-09035(3)	11-26-91	Affirm	$640.00
1-5	Serious	WAC 296-62-09031(2)(a) instance 1 & 2	9-4-91		$1600.00
		instance 3-8		Vacate	
1-6	Serious	WAC 296-62-07107(1)		Affirm	
1-7	Serious	WAC 296-24-75007(1)	7-17-91	Not Appealed	$800.00
1-8	Serious	WAC 296-62-07113(1)	9-4-91	Not Appealed	$400.00
			9-4-91	Not Appealed	$240.00
	General	WAC 296-62-05411(5)			
[illegible]	General	WAC 296-62-130(2)(a)	9-27-91	Not Appealed	None
2-3	General	WAC 296-24-58507(1) Fire Brigade	8-29-91	Not Appealed	None
2-4	General	WAC 296-79-140(6)(b) Stairwell	9-27-91	Vacate	None
2-5	General	WAC 296-79-140(3)(a)	9-27-91	Not Appealed	None
2-6	General	WAC 296-79-020(4)	11-26-91	Affirm	None
2-7	General	WAC 296-62-07115(3)(a)	9-11-91	Not Appealed	None
2-8	General	WAC 296-62-07113(3)	7-17-91	Affirm	None
2-9	General	WAC 296-62-3112(2)(i)	9-27-91	Affirm	None
2-10	General	WAC 296-62-07115(1)	11-26-91	Affirm	None
2-11	General	WAC 296-62-09013(1)	9-27-91	Affirm	None
			11-26-91	Affirm	None

Comments

Page 1

Total penalty assessed for all violations $ 7900.00

HEARING OFFICER'S SIGNATURE/ID Donald Lofgren L6601 DATE 11-27-91

REVIEWER'S SIGNATURE/ID DATE 4/29/94

Payment of all penalties shown is due within fifteen working days unless a Notice of Appeal is filed. Payment of penalties is to be made by check or money order payable to the "Department of Labor & Industries" and remitted to the Assistant Director for Industrial Safety and Health, P.O. Box 207, Olympia, Washington 98507-0207.

Employers and Employees or Representative of Employees: Any appeal of this Corrective Notice of Redetermination must be made to the Board of Industrial Insurance Appeals, Capitol Center Building, 410 West 5th Ave., Olympia, WA 98504 within fifteen working days of the employer's receipt of this notice. If no appeal is made, the violations are to be abated and any assessed penalties are to be paid. A copy of the Notice of Appeal must also be sent to the Division of Industrial Safety and Health, P.O. Box 207, Olympia, WA 98507-0207.

F418-650-000 Corrective Notice of Redeter (Rev. 4/90) 663-

White - Employer
Green - Spt Svcs/Case File
Canary - Region File
Pink - Inspector
Goldenrod - Support Services File

C4-2-2

SER-110

APPENDIX D

D1	Theresa Dillon Declaration	September 9, 1999
D2	Interviews	1995-2001
D3	Agency Underutilized Groups	1996, 1998

(4)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

HENRY GOSSAGE, Plaintiff, v. STATE OF WASHINGTON, Defendant.	NO. 98-2-00738-6 DECLARATION OF TERESA DILLON

TERESA DILLON, hereby declares under penalty of perjury under the laws of the State of Washington that the following is true and accurate:

1. I am over the age of eighteen; competent to testify and make the following declaration based on my own personal knowledge.

2. I am currently an employee of the Department of Personnel ("DOP") as the Manager in the Referrals and Scheduling Section. I have held this position since 1990.

3. In my section, we schedule candidates for multiple choice examinations, we score the examinations, and we establish and maintain registers (employment lists) that state agencies utilize in filling employment positions on a statewide basis.

4. I am the custodian of such records. These records include applications, employment histories of state employees, referrals and microfiche information generated from our date base.

5. The following is a brief outline of the recruitment process for state employment through DOP.

6. The process begins with a position opening. A register is then used to fill the opening or a bulletin describing the position is published. Applications are received by DOP and applicants are screened against minimum standards. If an applicant meets the minimum standards, the applicant is then tested. One or more of the following examination formats are used: written, oral, essay, performance, or experience and training ("E&T"). The names of applicants that pass the test are placed on the appropriate register. When an agency has a vacancy, it will make a request for certification to DOP. DOP will normally certify to the agency a list of names equal in number to six (6) more than there are vacancies to be filled from the ranked registers. This process in now normally handled by computer. Names are certified from the registers following a specific order dependent upon the type of register. Names on the same register are ranked according to score. In the case of one vacancy, a list of seven (7) names are referred to a requesting agency for interviews and selection.

7. In cases where the agency's vacancy is identified as part of an agency's affirmative action goals, up to three (3) additional names of persons who are members of protected groups may be referred to the requesting agency.

8. An agency may appoint any person referred from the DOP register.

9. Attached to this document are true and correct copies of seven (7) referrals that were made by DOP to the specified agencies. Henry Gossage was on each of these referrals.

10. The scores referenced on the registers are the scores that were achieved by each applicant on the E&T examination.

11. An "AP" referenced on the "Feedback" line indicates the person who was appointed to the position.

12. A "WA" in the "Feedback" line indicates the person waived the opportunity to be referred. In such a situation, another name would be referred.

13. A "REG" in the left-hand margin to the person's name indicates that the person was within the top seven names referred to the agency.

14. A "+3" in the left-hand margin to the person's name indicates that the person was one of the protected group members that made the list in addition to the first seven names.

15. A "REG +3" in the left-hand margin to the person's name indicates that the person was a protected group member and within the top seven names referred to the agency.

16. Mr. Gossage was not on an "Environmental Specialist" register in 1996. Mr. Gossage had been on a promotional register for this position; however, he came off the register in 1992. The Department of Agriculture did not hire anyone in an "environmentalist" position in 1996.

17. The Department of Fish and Wildlife had zero appointments in the position of Industrial Hygienist 3 in February 1997.

18. The Department of Labor and Industries did have appointments for Industrial Hygienist 3 positions in December 1995 and February 1996. Mr. Gossage was not on the referral for those positions. This could have been due to a number of reasons including that Mr. Gossage may not have scored high enough to make the referral, there could have been transfer candidates that did not require referrals, or the positions could have been outside of Mr. Gossage's region of availability.

DATED this 9 day of September, 1999, at Olympia, Washington.

TERESA DILLON

ARMS REPORT : AJ01
REPORT DATE : 09/09/96 PAGE : 1 0702

DEPARTMENT OF PERSONNEL
REFERRAL REQUEST

REFERRAL NO. : F1896026 AGENCY : 235 SUB :
DEPT LABOR & INDUSTRIES
CLASS : 53770 ALT CLASS :
IND HYGIENIST 3
LOCATION(S) : 81 GE395 A/O POSITIONS : 2473
82
WORK TYPE : F1 SHIFT : D
TRAVEL : DRIVERS LIC :
CONTINUE : N BYPASS : IR Y VR Y RE
SELECTIVE(S) : BULLETIN # :
NAMES OVERRIDE :
IN-TRAINING :
STATUS : F DATE ESTAB : 08 18 96
SKA : ETHNIC : B Y H A C
HANDICAPPED : VETERANS : VET (H, V, OR A) : DIS :

1 NAME : GORE, LARRY C SSN: [redacted]
REG PHONES : H [redacted] B MSG 352 0426 ADDR2 :
APP TYPE: AGY PROMO SCORE 83.8 CITY : [redacted]
FEEDBACK: RESULTS HA POSITION STATE : [redacted] ZIP : [redacted]
COMMENT :

2 NAME : FLEICHER, DONALD A SSN: [redacted]
REG PHONES : H [redacted] B ADDR2 :
APP TYPE: S/W PROMO SCORE 75.4 CITY : [redacted]
FEEDBACK: RESULTS FI POSITION STATE : [redacted] ZIP : [redacted]
COMMENT :

3 NAME : LOCKE, DANIEL P SSN: [redacted]
REG PHONES : H [redacted] B 339 271-1444 ADDR2 :
APP TYPE: RE-EMPLOY SCORE CITY : [redacted]
FEEDBACK: RESULTS AO POSITION STATE : [redacted] ZIP : [redacted]
COMMENT :

4 NAME : GOSSAGE, HENRY E SSN: 534583723 ADDR1 : [redacted]INSON PLACE
REG PHONES : H B 360 438 1069 ADDR2
APP TYPE: RE EMPLOY SCORE CITY : OLYMPIA
FEEDBACK: RESULTS CO POSITION STATE : WA ZIP : 98516
COMMENT :

+3 REINSTATEMENT ACTION referral

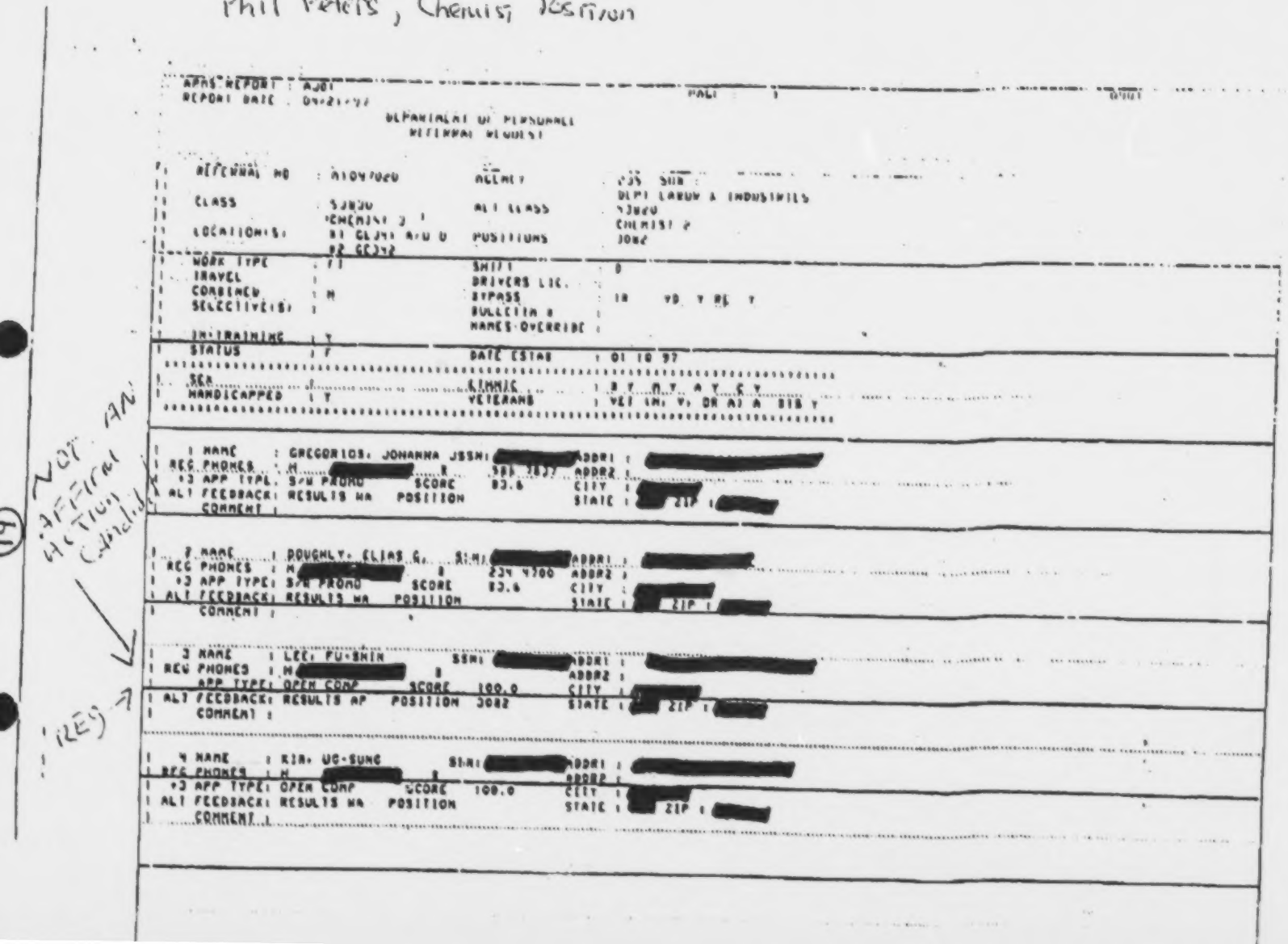
D1-2

(11)

SER-073

00059

Phil Peters, Chemist Position



APPS REPORT : AJ01
REPORT DATE : 04-21-97 PAGE 1 0001

DEPARTMENT OF PERSONNEL
REFERRAL REQUEST

REFERRAL NO : A1047020 AGENCY : 235 SUB : DEPT LABOR & INDUSTRIES
CLASS : 53820 CHEMIST 2 ALT CLASS : 53820 CHEMIST 2
LOCATION(S): 81 GLY1 A/U 0 82 GC352 POSITIONS : 3082
WORK TYPE : F1 SHIFT : 0
TRAVEL : DRIVERS LIC. :
COMBINED : M BYPASS : IR YD Y RL Y
SELECTIVE(S) : BULLETIN # :
IN-TRAINING : Y NAMES OVERRIDE :
STATUS : F DATE ESTAB : 01 10 97
SEX : ETHNIC : B Y H Y A Y C Y
HANDICAPPED : Y VETERANS : VET (N, Y, OR A) A DIS Y

1 NAME : GREGORIOS, JOHANNA JSSN: [redacted] ADDR1 : [redacted]
REG PHONES : H [redacted] B 981 3837 ADDR2 :
+3 APP TYPE: S/U PROMO SCORE 83.6 CITY :
ALT FEEDBACK: RESULTS MA POSITION STATE : [redacted] ZIP : [redacted]
COMMENT :

2 NAME : DOUGHLY, ELIAS G. SSN: [redacted] ADDR1 : [redacted]
REG PHONES : H [redacted] B 234 9700 ADDR2 :
+3 APP TYPE: S/U PROMO SCORE 83.6 CITY :
ALT FEEDBACK: RESULTS MA POSITION STATE : [redacted] ZIP : [redacted]
COMMENT :

3 NAME : LEE, FU-SHIN SSN: [redacted] ADDR1 : [redacted]
REG PHONES : H [redacted] B ADDR2 :
APP TYPE: OPEN COMP SCORE 100.0 CITY :
ALT FEEDBACK: RESULTS AP POSITION 3082 STATE : [redacted] ZIP : [redacted]
COMMENT :

4 NAME : KIM, UG-SUNG SSN: [redacted] ADDR1 : [redacted]
REG PHONES : H [redacted] B ADDR2 :
+3 APP TYPE: OPEN COMP SCORE 100.0 CITY :
ALT FEEDBACK: RESULTS MA POSITION STATE : [redacted] ZIP : [redacted]
COMMENT :

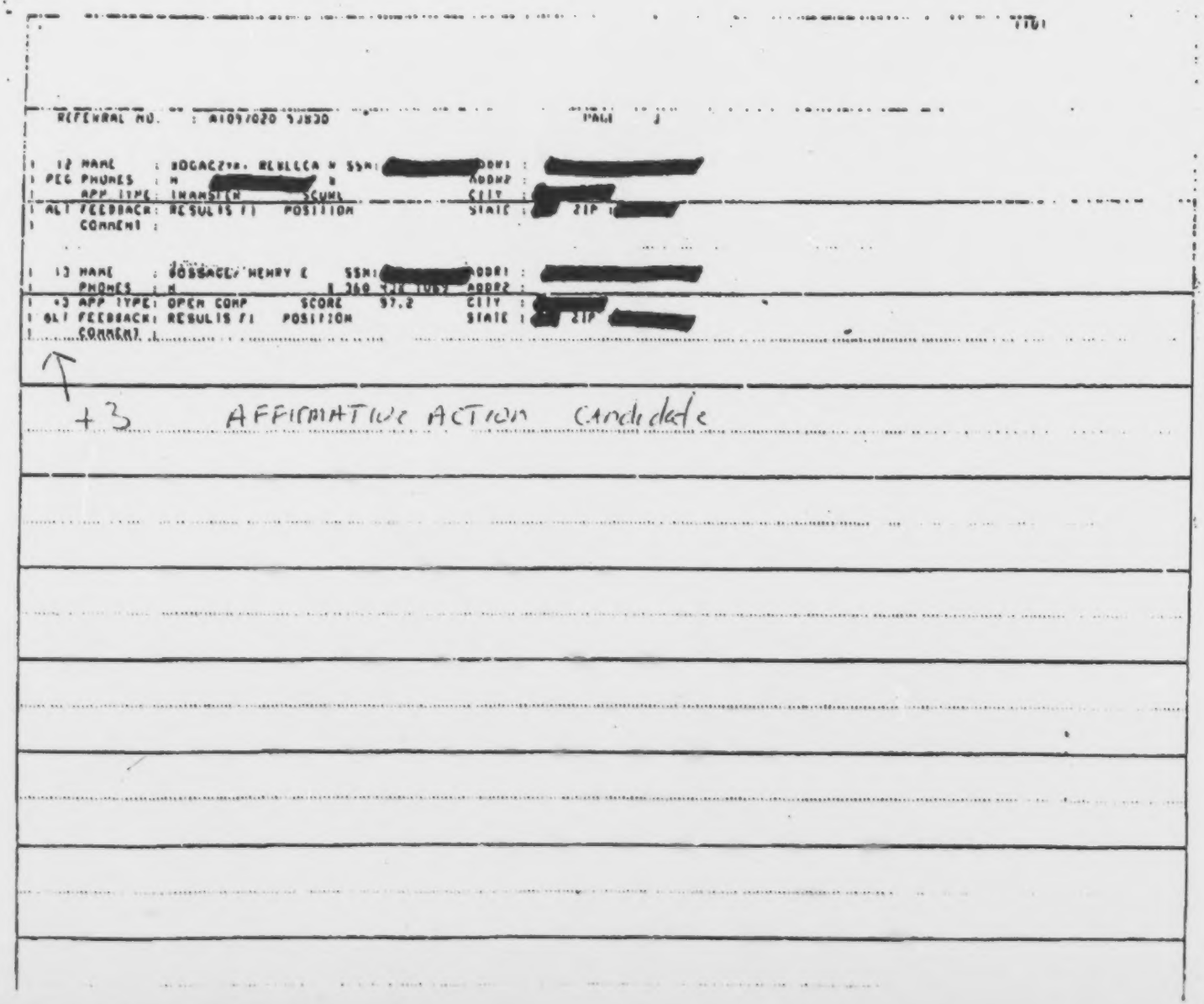
D1-2

(b1) Not Affirmative Action Candidate

(RES)

29000

[redacted]



DI-2 (21)

69000

SER-0

(1)

Labor & Industries

	Date	Agency	Job	Location	Interview Supervisor
1	September 1995	Labor & Industries	IH3	Vancouver	Blackwood
2	September 1995	Labor & Industries	IH3	Vancouver	Blackwood
3	September 1995	Labor & Industries	IH3	Longview	Blackwood
4	October 1995	Labor & Industries	SHS2	Yakima	Wanamaker
5	*December 1995	Labor & Industries		No Referral/Interview	
6	*February 1996	Labor & Industries		No Referral/Interview	
7	May 1996	Labor & Industries	IH3	Olympia	Spencer
8	July 1996	Labor & Industries	IH3	Spokane	Anderson
9	September 1996	Labor & Industries	IH3	Kennewick	McFadden
10	January 1997	Labor & Industries	Chemist	Olympia	Peters
11	# December 1997	Labor & Industries	SH train	Seattle	Brehmeyer
12	February 1998	Labor & Industries	SHS2	Bellingham	McHarg
13	February 1998	Labor & Industries	SHS2	Seattle	Brehmeyer
14	February 1998	Labor & Industries	SHS2	Everett	Giorgio
15	March 1998	Labor & Industries	SHS2	Olympia	McMurdie
16	* May 1998	Labor & Industries	IH2	Olympia	
17	June 1998	Labor & Industries	SHS2	Everett	Giorgio
18	July 1998	Labor & Industries	SHS2	Olympia	McMurdie
19	* August 1998	Labor & Industries	IH4	Olympia	
20	August 1998	Labor & Industries	SHS2	Longview	Drapeau
21	October 1998	Labor & Industries	SHS2	Tacoma	Smith
22	October 1998	Labor & Industries	SHS2	Vancouver	Sanford
23	# October 1998	Labor & Industries	IH3	Yakima	McFadden
24	October 1998	Labor & Industries	SHS2	E Wenatchee	Wanamaker
25	October 1998	Labor & Industries	IH3	Seattle	Smith
26	October 1998	Labor & Industries	IH3	Seattle	Smith
27	November 1998	Labor & Industries	SHS2	Bellingham	McHarg
28	January 1999	Labor & Industries	SHS2	Bellingham	McHarg
29	January 1999	Labor & Industries	SHS2	E. Wenatchee	Wanamaker
30	February 1999	Labor & Industries	IH3	Olympia	Lofgren
31	March 1999	Labor & Industries	SHS2	Spokane	Allen
32	June 1999	Labor & Industries	IH3	Yakima	McFadden
33	June 1999	Labor & Industries	IH3	Olympia	Lundeen
34	July 1999	Labor & Industries	SHS2	Seattle	Brehmeyer
35	** August 1999	Labor & Industries	IH3	Wenatchee	Weiss
36	March 2000	Labor & Industries	SHS2	Tacoma	West
37	March 2000	Labor & Industries	SHS2	Everett	Kaufold
38	March 2000	Labor & Industries	SHS2	Everett	Kaufold
39	March 2000	Labor & Industries	SHS2	Bellevue	Monahan

\# Register Canceled after Interview

* On the Registar....No Interview

D2

Other State Agencies

1	February 1996	Marine Safety	Lead Invest.	Olympia	Carter
2	August 1996	Dept. of Health	Public Health Advior		
2	October 1996	Ecology	Chemist	Tri Cities	Donnelly
4	November 1996	Dept. Agriculture	Environ. 2	Olympia	
5	January 1997	Dept. of Health	Lab Tech		
6	February 1997	Fish & Wildlife	Safety & Health Manager	Olympia	Rogers
7	March 1997	Sentencing Guideline Commission	Justice Research	Olympia	Van Wagenen
8	December 1997	Dept. Agriculture	Lab Assist.		
9	September 1998	Ecology	Scientific Tech		
10	October 1998	Fish & Wildlife	Scientific Tech		
11	# November 1998	General Administration	IH2	Olympia	Olsen
12	February 1999	Dept. Agriculture	Chemist		
13	June 1999	General Administration	IH3	Olympia	Swartz
14	July 1999	Dept. Agriculture	Lab Assist.	Olympia	Baker

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

PO Box 44000 • Olympia, Washington 98504-4000

S-NW-

OFFICE OF HUMAN RESOURCES

Date: 2/29/96

TO: Tracy Spencer Phone: 2-5530 Mail Stop: _____

FROM: Deborah Cummings Phone: 2-5687 Mail Stop: _____

SUBJECT: DOP referral request for Position 235-120 Class: T43

Enclosed are names referred to us by the Department of Personnel. Labor and Industries requests supplemental certifications whenever we do not meet established Affirmative Action goals for the job group. It is our policy to offer interviews to all +3 and agency promotional candidates. We have not met our goal(s) in the groups marked below.

If at least one of the applicants interviewed is a +3 candidate but the preferred applicant is not a +3 candidate, the supervisor is required by Administrative Policy 3.01 to complete an Appointment Approval Request form (F140-023-000). You have been referred 2 +3 candidate(s).

Black	✓
American Indian or Alaskan Native	
Asian or Pacific Islander	
Hispanic	
Female	
Vietnam-era Veteran	
Disabled Veteran	✓
People with Disabilities	✓

(Definitions of groups listed on next page.)

DEF-13000003
Interview Docs

If you have questions regarding our Affirmative Action Program or if we can be of additional assistance, please contact us at the number listed above.

[redacted]

00154

SER-089

D3

(2)

Wanamaker, John E

From:	Hooper, Michele L.
Sent:	Friday, October 23, 1998 8:15 AM
To:	Wanamaker, John E
Subject:	Referral for position #1211
Importance:	High

Date: October 23, 1998
To: John Wanamaker, Region 5, Compliance
From: Michele Hooper, OHR

Subject: DOP referral request for position #235-1211.
Attached are names referred to us by the Department of Personnel. Labor & Industries requests supplemental certifications whenever we do not meet established Affirmative Action goals for the job group. It is our policy to offer interviews to all +3 and agency promotional candidates. We have not met our goal(s) in the groups marked below.

You have been referred 3 +3 candidates at this time.

Underutilized groups are Native American, Asian Pacific Islander, Person with Disabilities, Disabled Veteran, African American, Female, Hispanic, Vietnam Era Veteran.

There were no RIF transition pool candidates available for this referral.

***** C.52 REFERRAL MAINTENANCE ***** MAPC521

REFERRAL NO. : J2298025 AGENCY : 235 SUB :
DATE ESTAB. : 10 22 1998 DEPT LABOR & INDUSTR
CLASS : 43171 ALT. CLASS :
S&H SPEC 2 - L&I
LOCATIONS :#1 GE043 A/O POSITION(S) : 1211
#2
WORK TYPE : FT SHIFT : D
TRAVEL : DRIVERS LIC. :
COMBINED : N BYPASS : TR N VD Y RE Y
SELECTIVE(S) : BULLETIN # :

IN-TRAINING :
STATUS :

D3

APPENDIX E

E1	Donna Holt Declaration	June 23, 2000

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

FILED
SUPERIOR COURT
WASH
98 JAN 26 AM 11:43
BETTY
BY

HENRY GOSSAGE,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendants.

NO. 98-2-00738-6

FIRST SUPPLEMENTAL DECLARATION OF DONNA LYNN HOLT

Donna Lynn Holt, under penalty of perjury under the laws of the state of Washington, declares as follows:

I have attested to my expertise in matters relevant to Plaintiff's case in my first declaration filed herein. This declaration is made in supplement to my earlier declaration and should be consolidated therein by this reference.

Since that declaration I have reviewed the following documents:

- deposition of Margarita Mendoza de Sugiyama, including exhibits
- deposition of Mark Sullivan, including exhibits
- deposition of Teresa Dillon, including exhibits
- defendants' response to plaintiff's supplementary interrogatories.

DISCRIMINATION BASED UPON RACE/ETHNICITY OR DISABILITY

PRIMA FACIE CASE OF DISCRIMINATION

The elements of a prima facie showing of discrimination exist:

1. Henry Gossage is a member of two protected groups: he is Asian and he has a cognizable disability. Defendants have recognized his status by his supplemental certification as either or both Asian and a person with a disability in referrals for virtually all positions in controversy here.

2. Henry Gossage was qualified for the position(s) he sought. It is undisputed that he was qualified or his name would not have been referred for consideration.

DOUMIT & DOUMIT
ATTORNEYS AT LAW P.C.
522 FRANKLIN STREET SE
OLYMPIA, WA 98501
(360) 754-6888/FAX (360) 754-7116

3. Plaintiff was not selected despite his qualifications. Although more than 30 positions are involved in plaintiff's allegations, for all of which he met the minimum qualifications, he was never selected.

4. The hiring agencies continued to seek applicants with plaintiff's qualifications. Here, the majority of positions were filled by individuals who were referred for consideration at the same time as was plaintiff; in several instances he was referred more than once for positions at the same job classification in the same agency.

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)

State agencies, as participants in federal contracting, are required to meet the provisions of the Civil Rights Acts and of Executive Order 11246. The Office of Federal Contract Compliance Programs (OFCCP), has promulgated "Uniform Guidelines on Employee Selection Procedures", a "set of principles designed to assist employers . . . to comply with requirements of Federal law prohibiting employment practices with discriminate . . ." and to foster equal opportunity for protected group members. These have been adopted by the Equal Employment Opportunity Commission and cited at 29 CFR Part 1607. Defendant Department of Labor and Industries' own equal employment opportunity/affirmative action policy relies upon the guidelines of the OFCCP. (See L&I policy 3.18; see also Deposition of Margarita Mendoza de Sugiyama, p. 8, and Deposition of Mark Gregory Sullivan, pp. 12, 15).

The OFCCP guidelines "apply to tests and *other selection procedures* which are used as a basis for any employment decision", including hiring. (OFCCP guidelines, Sec. 1607.2 (B)). (Emphasis added.)

TESTS - In Washington state government applications for state civil service positions are screened to determine if the applicant meets the minimum qualifications for each particular job classification. After that screening, those individuals who demonstrate their minimum qualifications, are administered one or more further tests. Among the tests administered are evaluations of experience and training, written examinations, and oral examinations. Approximately 85 percent of the tests administered are evaluations of experience and training, or "E&T" tests, wherein the

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recruitment announcement answers to certain questions are solicited from the applicants. These are scored and ranked based upon rating guidelines. (See Deposition of Dillon, p. 16.)

OTHER SELECTION PROCEDURES - Among the other selection procedures utilized by Defendants in positions in controversy here was the "structured interview." (See Declaration of Peters; Declaration of McFadden; Declaration of Dillon, p. 22, et seq.; Deposition of Mendoza de Sugiyama, p. 43, et seq.) This apparently consisted of a variety of questions directed to each interviewee by a panel of individuals. In the Department of Labor and Industries, some "structured interview" questions were established and recommended but not required to be used by those making hiring decisions. (See Declaration of Sullivan, p. 21.) Deponents do not consider structured interviews "tests" but Plaintiff asserts they are "other selection procedures" under the OFCCP guidelines. This is an issue of fact to be determined at trial.

VALIDITY OF TESTS/ OTHER SELECTION PROCEDURES - The OFCCP guidelines require the validity of tests and other selection procedures used to effect hiring. (Sec. 1607.2(C)). The tests and other selection procedures utilized by Defendants fall under these guidelines. Despite Plaintiff's requests for production of hiring packets including, but not limited to, "interview questions, examination scores, affirmative action justifications" for approximately 30 positions for which Plaintiff applied, Defendants have failed to produce, to any significant extent, these documents. (Plaintiff's Interrogatory No. 18.) This despite the assertion of Andrea Burgess that a hiring packet "would be the application forms, referral forms, tests, structured interviews, registers . . . agency affirmative action goals and timetables . . .." (Deposition of Andrea Burgess, p. 11.)

Indeed, Defendants in response to this interrogatory produced only a referral and certification listing for a single position. No scoring sheets or keys for the administration of the test of experience and training have been produced. No application forms or other indicia of the relative qualifications and scores of the applicants who were chosen over Plaintiff have been produced. I assume that because these documents were not produced in discovery, the do not exist and the OFCCP guidelines are not satisfied. (Defendants' own memorandum asserts the process utilized to select successful candidates is based upon "scientific methods governing appointments", yet nothing in that

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memorandum or in the documents offered supports the existence of the application of any scientific method applied by Defendants in their hiring procedures.)

DISPARATE OR ADVERSE IMPACT - In implementation of a state agency's affirmative action/equal employment opportunity program, and to ensure compliance with requirements of federal law, the OFCCP guidelines also prescribe mechanisms for measuring whether methods for choosing successful applicants have had a disproportionate negative impact upon members of a protected group. In order to measure disparate impact data about the protected group status of applicants, including applicant flow data, and utilization analysis of new hires, must be evaluated. Despite Plaintiff's request for production of these and other documents, Defendants have not produced any such data and the information necessary for Plaintiff to prove his case have been denied him. Defendants do assert certain relevant documents — including "Problem Area Analysis for New Hires" — have been provided with the deposition of Mark Gregory Sullivan. (Defendants' response to Plaintiff's Interrogatory No. G.) No such documents have been produced and gives rise to my assumption that the analyses necessary to assess possible disparate or adverse impact.

SELECTIVE CERTIFICATION

As noted in my earlier Declaration, there is a mechanism in state government for requiring additional "selective criteria" beyond those required by standard job qualifications. Plaintiff has requested but Defendants have not produced position announcements for the positions for which Plaintiff competed. I can only assume there were no selective criteria authorized beyond those required by the job specifications. It is a question of fact, therefore, whether "current or past experience" were appropriate criteria for choosing the successful candidate; whether recent experience was required to perform the jobs. These are reasons stated for disqualifying Plaintiff. (See Defendants' Memorandum in Support of Motion for Summary Judgment, p. 11.)

COMPOSITION OF "STRUCTURED INTERVIEW" PANELS

Defendants have failed to provide requested information about the training of supervisors and/or panel members regarding affirmative action. I assume this training has not occurred and any bias embraced by the panel members is a fact to be determined at trial.

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OLYMPIA, WA 98501
(360) 754-6888/FAX (360) 754-7116

AFFIRMATIVE ACTION DATA

Defendants have failed to provide requested affirmative action data including applicant flow, utilization analysis, EEO-1 reports, multi factor methodology and analysis, agency Affirmative Action Plans and Policies (in their entirety, including text and data), goals and timetables for achieving them. I assume these documents are not available and without them whether Defendants' equal employment and affirmative action efforts can be determined in compliance with federal and state law is a question of fact.

Dated this 23rd day of June, 2000 at Olympia, Washington.

Donna Lynn Holt

DONNA LYNN HOLT

DOUMIT & DOUMIT
ATTORNEYS AT LAW P.C.
522 FRANKLIN STREET SE
OLYMPIA, WA 98501
(360) 754-6388/FAX (360) 754-7116

APPENDIX F

F Interview Letters 1998-2001

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

WISHA Compliance
8625 Evergreen Way, Suite 250
Everett, WA 98208

February 27, 1998

Henry Gossage
9421 Johnson Pt. LP
Olympia, WA 98216

Dear Mr. Gossage,

Thank you for interviewing for the Safety & Health Specialist 2 position in Everett. We had a number of qualified candidates and a selection was made.

We appreciate you interest in this position.

Sincerely,

Grace Giorgio
Safety Compliance Supervisor
(425)290-1429

F1.

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

Region 4, Safety Compliance

PO BOX 44651; Olympia, WA 98504-4651

March 30, 1998

Henry E. Gossage
9421 Johnson Point Lp.
Olympia, WA. 98516

re: Safety Compliance Inspector 2 Position

Dear Mr. Gossage:

I would like to thank you for taking the time to interview for the Safety Compliance Inspector 2 position in Tumwater. The field of candidates was an exceptional one making the selection process a difficult one for the panel Although you were not selected to fill the current opening, I would like to encourage you to continue to interview for any future openings.

Thank you again for your concern for the safety of all employees.

Sincerely,

Dan K. McMurdie
Safety Compliance Supervisor

F .2

SER-096

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

300 W. Harrison Street Room 301
Seattle WA 98119-4081

February 17, 1998

HENRY GOSSAGE
9421 JOHNSON PT LP
OLYMPIA WA 98516

Dear Sir:

Interviews for a vacant Safety and Health Specialist 2 position at the Seattle service location will be conducted on 02/19/98. Your name has been referred for an interview opportunity from the "Open Competitive" State employment register.

Requirements for the interviews are:
1. 3 letters of Recommendation
2. A completed Washington State Employment Application.
3. A signed waiver so that reference and employment application information may be verified. The waiver form will be provided to you at the 3rd floor reception counter.

If you wish to interview so that you may be considered for this position, please make arrangements so that will be available for a panel interview at 11:00 a.m. on the 2nd of February, 1998. The interviews will conducted at 300 West Harrison Street; Seattle, Wa.. Please check in with the 3rd floor receptionist.

Thank you for your interest in this position.

Sincerely,

Henry E. Brehmeyer

Safety & Health Specialist 4
Region 2 (Seattle) Safety Compliance Supervisor
300 West Harrison Street
Seattle, Wa. 98119-4081
Phone: 206-281-5448

F-3

SER-020

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

January 7, 1999

Mr. Henry Gossage
9421 Johnson Point Loop
Olympia, WA 98516

Dear Mr. Gossage:

Thank you for your recent participation in our interview process for the Industrial Hygienist 3 position in Yakima. At this time I have decided to not fill this position, primarily because of the limited number of available candidates.

Additional recruitment will begin soon, in an effort to further build the applicant pool.

As long as your name remains active on the current register and you are referred for future vacancies, you will be considered again as part of the new hiring process. If you have questions about this application/referral process, please contact the Department of Personnel for clarification.

I hope you have not been greatly inconvenienced by my delay in coming to this decision. I appreciate the time and effort you put into your interview and look forward to possibly considering you in the future.

Sincerely,

John McFadden
Safety and Health Specialist 4

JMcF/lhs
Cc: Lee Strehlow, HR
File

F.4

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

525 E. College Way, Suite H, Mt. Vernon, WA 98273-5500

January 11, 1999

HENRY E. GOSSAGE
9421 Johnson Pt. Lp.
Olympia, WA 98516

Dear Mr. Gossage:

Your name has come up on the register for a full-time, permanent Compliance position as a Safety & Health Inspector 2 in the Bellingham service location. . Your interview for the position will be held in the Bellingham service location at 11:00 AM on Tuesday, Janauary 19, 1999 **see map attached . NOTE: Please bring resume and references with you to the interview.

Please contact Mark McHarg at (360) 416-3040 by Friday, January 15, as to whether you want to be interviewed for the position. If we do not hear from you by this date, we will consider the interview waived

Sincerely,

Mark McHarg
Compliance Safety Supervisor

Intervw2-199gossage

F · 5

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

January 15, 1999

Henry Gossage
9421 Johnson Point Loop
Olympia, WA 98516

Re: Safety and Health Specialist 2 in East Wenatchee and Bellingham

Dear Mr. Gossage,

This letter is to confirm our telephone conversation regarding an interview for a safety and health inspector position in the East Wenatchee office of Labor and Industries. Your interview has been scheduled for 9:30 AM on January 27th in the L&I office at 519 Grant Road in East Wenatchee. As you and I discussed, you will be on a trip at this time, but you agreed to interview by telephone. We request that you call us at the time of the appointment to give us a telephone number at which to call you back, and we will hold your interview by conference call. This interview will be a joint interview for safety inspector jobs in both East Wenatchee and Bellingham.

The interview will take place in two parts. The first part will be a panel interview, and the questions will be customer service oriented. The second part will be a one on one interview where Mark McHarg, SHS4, Region 1, and I will ask questions about your work experience, and education and training in the field of safety and health. The person in this position will perform inspections primarily in the agricultural, manufacturing, processing and construction industries, so the questions will focus on those industries.

You will find enclosed a consent form (and a return envelope) to allow us to contact references. Please sign the form and send it back to us. If we do not receive the signed form back, it will be considered a waive and you will not be interviewed. Please include a list of references when you send the form back to me.

If you have any questions, please call me at (509) 454-3750.

Sincerely,

John E. Wanamaker
Regional Safety and Health Supervisor

F.-6
talked to Bob Barton
FAX 509-454-3710

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

Division of Consultation and Compliance

WISHA Policy and Technical Services
P.O. Box 44610 · Olympia, Washington 98504-4610

February 8, 1999

Henry E. Gossage
9421 Johnson Pt Lp
Olympia, WA 98516

Dear Mr. Gossage:

Thank you for agreeing to interview for the Industrial Hygienist 3 vacancy within Policy and Technical Services, Department of Labor and Industries. The position is located in Tumwater. As will be explained further at the interview, the position is classified as an Industrial Hygienist 4-in-training, entry as an Industrial Hygienist 3. Your interview is scheduled as follows:

Friday, February 12, 1999, 8:30 AM
Room # S129
Department of Labor and Industries
7273 Linderson Way SW
Tumwater, WA 98501

After arriving at the Labor and Industries building, please stop in at the visitor's desk in the lobby. Inform the receptionist that you have an appointment with Don Lofgren. An assistant or myself will meet you in the lobby and escort you to the interview room.

You are requested to bring with you a copy of your state application and resume as may be available. Also, you will need to provide a list of at least three references, including your current supervisor. The interview should last for an hour to an hour and a half.

Should you have any questions, please call.

Sincerely,

Don J. Lofgren
Acting IH Program Manager
Policy & Technical Services

F-7

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

525 E. College Way, Suite H, Mt. Vernon, WA 92873-5500

May 7, 1999

HENRY E. GOSSAGE
9421 Johnson Pt. Lp.
Olympia, WA 98516

Dear Mr. Gossage,

Thank you for participating in the testing and interview process for the Compliance Safety & Health Inspector - 2 in Bellingham.

We have selected another candidate for the position.

When other positions become available throughout the state, the interview portion of the process will have to be conducted again. I hope your experience here was favorable and that you are successful at your next interview for this position.

Sincerely,

M. McHarg

Mark McHarg
Compliance Safety Supervisor

MM/tma

F-8

Washington State Department of Transportation
Sid Morrison
Secretary of Transportation

Transportation Building
P.O. Box 47300
Olympia, WA 98504-7300

May 24, 1999

1:45 PM
Panel
RM 1-D22
WINS D

Mr. Henry E. Gossage
9421 Johnson Pt. Lp.
Olympia WA 98516

RE: Industrial Hygienist 3

Dear Mr. Gossage:

I have received your name on a referral list for an Industrial Hygienist 3 position with the Washington State Department of Transportation. I have attempted to contact you by telephone with no success. I am planning to interview all referrals for this position on June 3, 1999, at the Olympia Service Center's Safety and Health Services Office in Olympia, Washington.

If you are interested in interviewing for this position please contact me as soon as possible at (360) 705-7099 to schedule an interview time on June 3, 1999.

I hope to hear from you soon.

Sincerely,

REXFORD SWARTZ
Safety and Health Administrator

6/1/99

RWS:mce

6/2/99
– got Fonz's when he called –

attn: Rex
FAX 705 6837

P. 9

519 Grant
E. Wenatchee
98902

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

1:30
2:30
3:30
4:30
12:30
11:30
9:30

6/4/99

FAX
509
886
6510

Dear Mr. Gossage:

IH3 INTERVIEW

I have scheduled an interview for you beginning at 5:00 pm in the Yakima Service Location small conference room (YAK3) on June 17, 1999.

Directions are enclosed. The Yakima Service Location front desk number is 509.454.3700.

Thank you for your interest in this position. If you have any questions, please contact me at 509.886.6570.

Sincerely,

John R. McFadden
Safety and Health Consultation Supervisor

1800
355
1212

225
5528

Gossage
426-6781

Jenny -
answered the Span
want to get them in
interview

F 10

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

WISHA Services Division

June, 22th, 1999

Henry E. Gossage
9421 Johnson Pt. Lp
Olympia, WA 98516

Dear Mr. Gossage:

Your name has been referred for a permanent position as an Industrial Hygienist 3. I left a message for you at (360) 438-1069. As of the date of this letter, I have not heard back from you.

If you want to interview for this position, please contact me at (360) 902-4615 by 5:00PM on Thursday, July 1st, 1999. If I do not hear from you by that time, I will have to consider you as a waive on this referral.

Sincerely,

Alan Lundeen

Alan Lundeen
Safety and Health Specialist

F · 11

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

616 - 120th Avenue NE, Suite C-201 • Bellevue, Washington 98005-3037

Henry Gossage
9421 Johnson PT LP
Olympia, WA. 98516

Dear Henry,

This letter is to confirm your interview time and date for the Safety and Health Specialist II position in Bellevue. The interview will be on **July 6, 1999** at **11:00AM** at 616-120th Ave. NE Suite C201, Bellevue, WA. 98005.

Please bring with you your Washington State Application for this position and resume if you have one, a copy of your drivers license, a copy of proof of auto insurance and 5 personal references including your present supervisor with phone numbers.

Sincerely,

James A. Monahan

James A. Monahan
Safety Compliance Supervisor

F 12

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

July 20, 1999

Henry E. Gossage
9421 Johnson Pt. LP
Olympia, WA. 98516

Dear Henry:

There will be interviews conducted at the Seattle Service Location (300 West Harrison St. Seattle WA. 98119) on 07/22/99 and 07/29/99 to fill open SHS 2 positions on my staff. Inspection personnel will be assigned to & work out of the Seattle Service Location, which is situated at 300 West Harrison Street, Seattle WA.

The staff is tasked with providing on site, job safety inspection services throughout the heart of the Greater Seattle Metropolitan area. The regular work hours will be from 8:00 a.m. to 5:00 p.m., Monday through Friday. The primary job duties will consist of on site (field) job safety inspections, job related office work & administrative duties (report writing, technical code study & interpretations), customer service functions (phones, communications, answering technical queries) & participating in training & professional development sessions & seminars.

At the time of the interview, please submit:
1. A completed Washington State Employment Application.
2. Three (3) reference contact names, with current contact phone numbers & addresses.
3. A brief personal resume'.

You will be required to sign a waiver so that reference checks may be performed.

If you have any questions, please contact me (Gene Brehmeyer) at 206-281-5448.

Thank you for your interest.

Gene Brehmeyer

Gene Brehmeyer
Safety Compliance Supervisor
Department of Labor & Industries
Region 2 Compliance
300 West Harrison Street

F 1.13

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

300 W. Harrison Street, Seattle, WA 98119-4081

January 10, 2001

Henry Gossage
9421 Johnson PT LP
Olympia WA 98516

Dear Mr. Gossage,

Your name appeared on a list of potential candidates to interview for an Industrial Hygiene compliance officer position in both the Seattle and Tukwila offices of the Department of Labor and Industries. I will be conducting panel interviews for these positions. If you are interested in securing an interview please call me immediately. I can be reached at (206) 281-5452.

If I do not hear back from you by January 19, 2001 I will consider you to have waived on the interview.

Sincerely,

Sherry Baron

Sherry Baron, CIH
Industrial Hygiene Supervisor

F1-14

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

729 100th Street SE
Everett, WA 98208-3727

January 26, 2001

Henry E. Gossage
9421 Johnson Point Loop
Olympia, WA 98516

Dear Mr. Gossage:

On behalf of the Department of Labor and Industries, I want to thank you for taking the time to interview for the Industrial Hygiene Consultant positions in Everett and Mount Vernon.

We have completed our evaluation of the candidates referred to us for consideration, and you were not selected. We have offered the positions to other qualified candidates, and they have accepted.

Thank you for your interest in the positions and best wishes in the future.

Sincerely,

Cindy Horton
Region 1 Safety & Health Consultation Supervisor
(425) 290-1431

F-1 '15

SER-101

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

729 100th St SE
Everett WA 98208-3727
(425) 290-1429

March 28, 2000

Mr. Henry Gossage
9421 Johnson Point Loop
Olympia WA 98516

Dear Mr. Gossage:

I have you scheduled for an interview at 11 am, April 7th. Please bring a resume, references, and a copy of your state application. Our office is located at 729 100th Street SE, Everett WA 98208.

Attached please find MapQuest directions.

If you have any questions please feel free to call.

Sincerely,

Kurt Kaufold
Safety & Health Compliance Supervisor

F 1 16

200. Dr Louie

Subj: **Interview for IH position**
Date: 9/4/01 4:50:17 PM Pacific Daylight Time
From: SIMC235@LNI.WA.GOV (Simatic, Carol A.)
To: hegossage@aol.com ('hegossage@aol.com')
CC: SIMC235@LNI.WA.GOV (Simatic, Carol A.)

Your name has appeared on the State of Washington Industrial Hygiene 3 referral register.
You have stated to me that you want to interview.
I have a 10:00 AM and 11:00 AM open on the 6th of September.
Please let me know if either one of those times is convenient for you.
Please bring the following with you to the interview:
A completed State of Washington application, if you are a state employee if not, please bring a current resume.
A list of at least 3 references of your peer's and or former employer's or supervisor's.
Please bring with you two samples of persuasive writings.
The interview process is designed to identify the best candidate for the position. Please do not forget your persuasive writings.

At the time of the interview you will be asked to sign a release form to allow the department to contact your references.
Please plan to arrive at least 35 to 40 minutes ahead of your scheduled time. You will be given 30 minutes prior to interview time to go over the interview questions. So if you choose the 10:00 AM time slot please arrive at approximately 9:20 AM.

We are located at 950 Broadway Suite 200. As soon as I find driving and parking instructions that I have somewhere I will e-mail them to you.
You can call me anytime at 253 596-3929 or my cell phone is 235 377-5541.

---------- Headers ----------
Return-Path: <SIMC235@LNI.WA.GOV>
Received: from rly-xd03.mx.aol.com (rly-xd03.mail.aol.com [172.20.105.168]) by air-xd02.mail.aol.com (v80.17) with ESMTP id MAILINXD25-0904195016; Tue, 04 Sep 2001 19:50:16 -0400
Received: from lnix-juniper.lni.wa.gov (lnix-juniper.lni.wa.gov [198.239.152.79]) by rly-xd03.mx.aol.com (v80.17) with ESMTP id MAILRELAYINXD37-0904195003; Tue, 04 Sep 2001 19:50:03 -0400
Received: by lnix-juniper.lni.wa.gov with Internet Mail Service (5.5.2653.19)
id <SDZ6W9PM>; Tue, 4 Sep 2001 16:48:13 -0700
Message-ID: <93642B57FF1AD411801800508B6B389F032773CC@LNIX-LARCH>
From: "Simatic, Carol A. " <SIMC235@LNI.WA.GOV>
To: "'hegossage@aol.com'" <hegossage@aol.com>
Cc: "Simatic, Carol A. " <SIMC235@LNI.WA.GOV>
Subject: Interview for IH position
Date: Tue, 4 Sep 2001 16:48:06 -0700
MIME-Version: 1.0
X-Mailer: Internet Mail Service (5.5.2653.19)
Content-Type: text/plain;
charset="iso-8859-1"

F 4 17

APPENDIX G

G1	Joesph Walkerhauer Declaration	June 27, 2001
G2	Don Lofgren Reference	September 3, 1996
G3	Don Lofgren Interview	February 8, 1999
G4	Bob Parker Reference	1996
G5	Grace Georgio, review Gossage Personnel file	June 25, 1998

(3)

**SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY**

HENRY GOSSAGE,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendant.

NO. 98-2-00738-6

**DECLARATION OF
JOSEPH WALKENHAUER**

I, JOSEPH WALKENHAUER, under penalty of perjury under the laws of the State of Washington, declare as follows:

1. I am over eighteen (18) years old and am competent to testify.
2. I was present at a meeting in which Janine Rees, of the Department of Labor and Industries, was present.
3. The discussion, which I heard, questioned Henry Gossage's whereabouts and employment.
4. Janine Rees responded by saying that Henry Gossage lived in the Olympia area.
5. The question was then asked if Henry Gossage was working for the Department of Labor and Industries again.
6. Janine Rees responded in the negative, saying that Henry Gossage had been trying to get back on with the Department, but that, "there was no way that the Department

ORIGINAL

G1

(4)

would ever hire him back."

That was about the extent of the conversation involving Henry Gossage.

DATED this 27 day of June, 2001.

JOSEPH WALKENHAUER

[redacted] (2) [redacted]

DRAFT

Reference Question and Answers

Reference Questions For: Henry Gossage Date 9/03/96

Reference Answers From: Don Lofgren, former Supervisor L&I

1. Does he/she arrive to work on time? Yes

2. What duties did this employee do that required close supervision?
Did not have much IH background, had to train him, after 2 years he still needed supervision in personnel areas.

3. Describe situations that illustrate the dependability & reliability for this individual to get their work done on time.
Willing to do the work. Productivity was OK. Some things needed revisions and changes due to mistakes, he was a little hard-headed on some things

4. Describe how this candidate is motivated to move from one task to another.
He was willing to take on assignments.

DEF-18000012
Interview Docs

5. Describe any work related issues that you have counseled this employee on more than once during the past year? How were they resolved? I had recurring problems w/ Gossage, he was very challenging/confrontational and used union/system rules to his advantage. Some things were resolved, some not.

6. Describe how this employee is able to pay attention to detail and follow procedure?
He was satisfactory. He had a few problems in the field, but did a fair job with people. His dress was not always appropriate.

7. Describe how this candidate demonstrates a value for accuracy and the ability to achieve accuracy standards. He was OK with numbers and he was fairly analytical.

8. Would you hire him/her again? Why? No. Based on his record with me, no. He was hard to get along with, and had an effect on other staff with comments. His writing skills were poor at first and did not improve dramatically. Alot of headache.

9. Who else could I contact about this candidates job performance? Phil Peters, Terry Walley, Ron Takase, Janet Kurina

Refqu 3/20/96 Notes: started 1/90 resigned June 1992. He was performed interviews in a plant, and he gave me the finger in the work place in front [illegible]

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

Division of Consultation and Compliance

WISHA Policy and Technical Services
P.O. Box 44610 · Olympia, Washington 98504-4610

February 8, 1999

Henry E. Gossage
9421 Johnson Pt Lp
Olympia, WA 98516

Dear Mr. Gossage:

Thank you for agreeing to interview for the Industrial Hygienist 3 vacancy within Policy and Technical Services, Department of Labor and Industries. The position is located in Tumwater. As will be explained further at the interview, the position is classified as an Industrial Hygienist 4-in-training, entry as an Industrial Hygienist 3. Your interview is scheduled as follows:

Friday, February 12, 1999, 8:30 AM
Room # S129
Department of Labor and Industries
7273 Linderson Way SW
Tumwater, WA 98501

After arriving at the Labor and Industries building, please stop in at the visitor's desk in the lobby. Inform the receptionist that you have an appointment with Don Lofgren. An assistant or myself will meet you in the lobby and escort you to the interview room.

You are requested to bring with you a copy of your state application and resume as may be available. Also, you will need to provide a list of at least three references, including your current supervisor. The interview should last for an hour to an hour and a half.

Should you have any questions, please call.

Sincerely,

Don J. Lofgren
Acting IH Program Manager
Policy & Technical Services

G-3

APPLICANT Henry Gossage (5)

DATE 10/19/96

+ M sup: Worked with Henry on committee

1. How would you rate this person's technical skills and expertise?

Very good, Re: work on committee did work as requested

Very good Re Chemistry

2. How would you rate this person's performance as an employee, regarding work ethic and accountability?

attend meetings as required, did work required, & flag. - a committee & interaction with the Field and Lab.

3. How does this person interact with fellow employees and customers?

did very good on this committee

DEF-17000208
Interview Docs

G4-1

[redacted]

00150

(6)

Reference Check Questions

For: Henry Gossage

Name: Bob Parker

1. Did the person consistently meet expectations?

Yes —

2. Was the person required and able to handle multiple priorities?

Only worked on 1 project at time

3. Did the person interact well with managers, co-workers and customers?

Did not see any problems

4. How was the quality and accuracy of the person's completed work?

Don't recall any problems

5. Did the person work well independently as well as in groups?

Yes — had stuff together

Would you hire this person again?

Have to think about

00149

G4-2

SER-142

ACCESS TO FILE OF: _____

NOTE: I understand that nothing is to be added to or removed from this file.
If you need assistance, please ask. Thank you

Signature Grace Giorgio Name (printed): Grace Giorgio	Date: 6/25/98	Time: 9AM	Witness Initials:
Signature File Copied for BJ 9-2-98 WB Name (printed):	Date: 9-2-98	Time: 1:30 pm	Witness Initials:
Signature Henry Gossage Name (printed): Henry Gossage	Date: 2/26/99	Time:	Witness Initials:
Signature Name (printed):	Date:	Time:	Witness Initials:
Signature Name (printed):		Time:	Witness Initials:
Signature Name (printed):		Time:	Witness Initials:
Signature Name (printed):		Time:	Witness Initials:
Signature Name (printed):		Time:	Witness Initials:

While You Were Out

Date: 2-25, Time: 10:35
For: BJ
From: Henry Gossage
Phone #: 438-1069

- ☒ Telephoned
- ☒ Please call
- ☐ Wants to see you
- ☐ Will call again
- ☐ Returned your call
- ☐ URGENT
- ☐ Was here to see you

Message: Wants to view his personnel file (from archives) tomorrow

Taken by: Lynne

G5

APPENDIX H

H	Cancelled Hiring	1997-1999

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

300 West Harrison, Seattle, WA 98119
(206) 281-5470

December17, 1997

Henry E. Gossage
9421 Johnson Pt Loop
Olympia, WA 98516

Dear Mr. Gossage:

Region 2 will not fill the Safety and Health Specialist 1 (in training) position at the Seattle service location. Thank you for your interest in this position.

Sincerely,

Henry E. Brehmeyer
Compliance Supervisor, Region 2
(206) 281-5448

H-1

SER-093

STATE OF WASHINGTON
DEPARTMENT OF GENERAL ADMINISTRATION
DIVISION OF CAPITOL FACILITIES
P.O. Box 41019, Mail Stop 1019 • Olympia, Washington 98504-1019
(360) 753-5686 • FAX (360) 586-5954 • TDD (360) 664-3799

November 9, 1998

Henry Gossage
9421 Johnson Point Loop
Olympia, WA 98516

Dear Mr. Gossage;

I would like to thank you for your time and interest in the Division of Capitol Facilities and for interviewing for the Industrial Hygienist 2 position.

We appreciate the time you spent to interview with us. We have reevaluated our need and believe that the work needed, may be at a higher level than originally anticipated. Because of this, we will not be filling this position at this time.

Please know that you did interview well and we enjoyed the opportunity to meet with you. I wish you the best in your future endeavors, and again thank you for your time and interest.

Sincerely,

Jack Olson
Physical Plant Engineering Manager

1) Didn't fill IH2
2) Called IH3 register, did not fill using it.
3) going to advertise later said at interview needed to fill immediately!!

12/21/98
586-5953
have not filled position

IH 2

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

January 7, 1999

Mr. Henry Gossage
9421 Johnson Point Loop
Olympia, WA 98516

Dear Mr. Gossage:

Thank you for your recent participation in our interview process for the Industrial Hygienist 3 position in Yakima. At this time I have decided to not fill this position, primarily because of the limited number of available candidates.

Additional recruitment will begin soon, in an effort to further build the applicant pool.

As long as your name remains active on the current register and you are referred for future vacancies, you will be considered again as part of the new hiring process. If you have questions about this application/referral process, please contact the Department of Personnel for clarification.

I hope you have not been greatly inconvenienced by my delay in coming to this decision. I appreciate the time and effort you put into your interview and look forward to possibly considering you in the future.

Sincerely,

John McFadden
Safety and Health Specialist 4

JMcF/lhs
Cc: Lee Strehlow, HR
File

H 3

APPENDIX I

I1 Phil Peters Declaration
I2 John McFadden Declaration

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

HENRY GOSSAGE,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendant.

NO. 98-2-00738-6

DECLARATION OF PHILLIP M. PETERS

PHILLIP M. PETERS, hereby declares under penalty of perjury under the laws of the State of Washington that the following is true and accurate:

1. I am over the age of eighteen; competent to testify and make the following declaration based on my own personal knowledge.

2. I am currently an employee of The Department of Labor & Industries (the Department) as Industrial Hygiene Lab Manager. I have held this position since 01/10/78.

3. On 01/27/97, I was part of a panel interviewing candidates for a Chemist 3 position with the Department's Olympia Office. The other panel members were Christy Wood and Marty Cohen. As members of the interview panel, we received a referral list of 9 names and phone numbers from the Department. We interviewed the candidates and determined that Tom Pearson was the best candidate for the position based on his interview score, references, qualifications and experience. Mr. Pearson's name was forwarded to Gail Hughes for appointment on 2/13/97. Shortly thereafter, a meeting with myself, Gail Hughes, Michael Silverstein (WISHA Assistant Director) and our Personnel Officer, John Barnes was held. At this meeting, I was persuaded to

ATTORNEY GENERAL OF WASHINGTON
Torts Division
629 Woodland Square Loop SE
PO Box 40126
Olympia, WA 98504-0126
(360) 459-6500

00026

I1

hire a +3 candidate. The panel then selected Fu-Shin Lee, a +3 candidate, based on her education (a Ph.D.), her references and her interview score. I forwarded the panel's second hiring recommendation to Gail Hughes and that recommendation was approved on 4/9/97.

4. Henry Gossage was not selected because of a poor score on his structured interview. He finished 8th of the 9 individuals interviewed.

5. Mr. Gossage's prior conviction was not brought up or mentioned during his interview and that information was not provided to us by the Department or Mr. Gossage as part of his interview materials. I was aware of Mr. Gossage's prior conviction before the interview process and selection, but it had no effect on my recommendation. I have Mr. Gossage the highest score on the panel. The only information the Department furnished our office was Mr. Gossage's name, phone number, address, application score, and +3 status. Mr. Gossage did provide the panel with a copy of his State Application for Employment during his interview. The application did not reflect Mr. Gossage's prior conviction.

6. Mr. Gossage, was given a fair chance to compete for the position and the panel found better candidates for the position. At no time was Mr. Gossage's prior conviction considered or made part of the hiring equation.

DATED this 9th day of September, 1999, at Olympia, Washington.

Phillip M Peters

PHILLIP M. PETERS

ATTORNEY GENERAL OF WASHINGTON
Torts Division
4224 Woodland Square Loop SE
PO Box 40126
Olympia, WA 98504-0126
(360) 438-4600

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

HENRY GOSSAGE,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendant.

NO. 98-2-00738-6

DECLARATION OF JOHN MCFADDEN

JOHN MCFADDEN, hereby declares under penalty of perjury under the laws of the State of Washington that the following is true and accurate:

1. I am over the age of eighteen; competent to testify and make the following declaration based on my own personal knowledge.

2. I am currently an employee of The Department of Labor & Industries (the Department) as Safety and Health Consultation Supervisor. I have held this position since 07/16/96.

3. On 08/96, I was part of a panel interviewing candidates for a Industrial Hygienist 3 (IH3) position with the Department's Yakima and Kennewick office. The other panel members were: Marty Weis, Ruby Reidel and Randy Mooney. As members of the interview panel we received a referral list of 7 names and phone numbers from the Department. We interviewed six of the candidates and determined that Mark Mease was the best candidate for the position based on his qualifications and experience. Mr. Mease scored a 76 on his structured interview as

ATTORNEY GENERAL OF WASHINGTON
Torts Division
629 Woodland Square Loop SE
PO Box 40126
Olympia, WA 98504-0126

I2

compared t Mr. Gossage's 63. I forwarded the panel's hiring recommendation to Rudy Arellano and that recommendation was approved on 9/9/96.

4. Henry Gossage was not selected because he did poorly on the interview.

5. Mr. Gossage's prior conviction was not brought up or mentioned during his interview and that information was not provided to the panel by the Department or Mr. Gossage as part of his interview materials. Mr. Gossage's prior conviction had no effect on my recommendation for hire. Mr. Gossage was given a fair chance to compete for the IH3 position and each panel member can attest to this.

DATED this _____ day of September, 1999, at _____. Washington.

_____
JOHN MCFADDEN

ATTORNEY GENERAL OF WASHINGTON
Torts Division
629 Woodland Square Loop SE
PO Box 40126
Olympia, WA 98504-0126

let discuss (1) dlh

From: DAIL235 --WLNIVM1
To: MCFJ235 --WLNIVM1 John McFadden

ıte and time 08/29/96 18:01:48

From: Lance Daigre, Personnel Officer
Regions 5 and 6
Subject: Interview
John, sorry I didn't get back to you sooner, but the day has been hectic. I would suggest that you use the same question for Gossage as you used for Mease, since Gossage is a +3 and Mease is your tenative candidate of choice. That way we won't have two +3s that were given a different question than the candidate of choice. Give me a call in the morning; would like to talk to you about your conversation with Henry Gossage.

Where is the question from McFadden / E-mail?

(2)

INDUSTRIAL HYGIENIST
INTERVIEW QUESTIONS
(Applicant's Copy)

1. What attributes do you bring to this position that will contribute to your success?

2. In your view, what should the role of WISHA Consultation be?

3. As an Industrial Hygienist in Region 5, you will be one of a group of staff providing services to area employers. Describe how you would function as a member of such a team. (1) Team member open to discuss issues / problems Q-FLAG

4. What support would you expect from your team members?
(1) objective
(2) boards ideas / get feedback (3) group meeting discuss current problem / project

5. If you were to be requested to be involved in a consult with employee illness due to carbon monoxide poisoning:

(1) What symptomology would you expect to see? headache, dizziness, fatigue
(2) What tests would you do to identify concentrations of CO gas in the work environment and the exposed employee? Draw Tube / CO monitor screen
(3) What medical tests should be evaluated?
Blood CO bind more tightly Hgb than O2

1: Another not good review & discuss w/ other IH / safety

6. A request is given to you for evaluating a fruit packing and storage facility in Central Washington:
silo confin space
O2 deficiency

(1) What might you expect to find?
(2) What chemical programs should you be ready to evaluate? Resp. Protection
Agricult Chemicals
Haz Com. / HCP / Resp? / Confin Space

7. What experience have you had as a trainer and/or public speaker?
Hygiene Lab
Lab TA
↓ report & Union Rep
ECS / Research Faculty /

8. Part of your duties will be to develop and coordinate outreach and marketing efforts to community, business, and labor organizations. What are some things you would do to accomplish this?
Biggest area small Employ < 10?

(3)

INDUSTRIAL HYGIENIST
INTERVIEW QUESTIONS
(Applicant's Copy)

1. What attributes do you bring to this position that will contribute to your success?

2. In your view, what should the role of WISHA consultation be?

3. As an Industrial Hygienist in Region 5 you will be one of a group of staff providing services to area employers. Describe how you would function as a member of such a team.

4. If you were to be requested to be involved in a consult with employee illness due to carbon monoxide poisoning:
   (1) What symptomology would you expect to see?
   (2) What tests would you do to identify concentrations of CO gas in the work environment and the exposed employee?
   (3) What medical tests should be evaluated?

5. A request is given to you for evaluating a fruit packing and storage facility in Central Washington:
   (1) What might you expect to find?
   (2) What chemical programs should you be ready to evaluate?

6. Mass spectrometry is an analytical technique utilized to provide qualitative identification of organic compounds. What does the technique require?
   (a) Compound be in liquid phase.
   (b) Compound be in gas phase.
   (c) Compound be in excited phase.
   (d) Compound be radicalized

7. What experience have you had as a trainer and/or public speaker?

8. Part of your duties will be to develop and coordinate outreach and marketing efforts to community, business, and labor organizations. What are some things you would do to accomplish this?

P:\SH\IHO-ACT:(08/16/96):nt

DEF-18000122
Interview Docs

00204

I2-3

SER-134

[redacted]

(1)

Department of Labor and Industries
OHR
PO Box 44821
Olympia WA 98504-4821

APPOINTMENT APPROVAL REQUEST

Position number: 235 2473

Job classification (CQ and referral attached): IH3

Name of preferred candidate (Copy of application/resume attached): Mark Mease

Qualifications and reasons for preference (Structured interview questions and responses attached, if appropriate):

Mr. Mease is a Certified Industrial Hygienist with over 8 years of professional experience as an Industrial hygienist. He received a unanimous recommendation from the interview panel as the preferred candidate. His score was excellent on the structured interview. He is a professional member of AIHA, ACGIH, and ASSE, all occupational safety and health professional societies. His references were excellent (see attached).

Names of +3 candidate(s) interviewed (Copies of applications/resumes attached):

Henry Bossage

Reasons for non-selection of +3 candidate(s) (Structured interview questions and responses attached, if appropriate):

Mr. Bossage did not do well on the structured interview. His score of 63 was unacceptable to the panel. Mr. Bossage's previous supervisor within Labor and Industries did not provide a favorable recommendation, and stated he "would not hire him." Mr Bossage's resume is not consistent with his state application in that his application makes reference to Self-employment from 92-95 and his resume makes no mention of this. The interview panel felt that his background was insufficient to justify an IH3 qualification, and I concurred.

Supervisor	Phone	Division/Section	Date
John McFadden	(360) 902-5495	WISHA Consultation	9/3/96

Signature of other managers, if required:

Personnel recommendation:

Signature: _____ Date: _____

Division director (or Director) determination:

Signature: _____ Date: _____

DEF-18000204
Interview Docs

Please read the back of this form.

09152

[redacted]I2-4

SER-137